Supreme Court, U.S.
FILED
AUG 5 1996
OFFICE OF THE CLERK

No. 96 204

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

SYDNEY KOVEN, BARBARA KOVEN, Petitioners, (also known as BARBARA A. WOOD), GARRET GALLERY, INC., a California Corporation,

Petitioners,

v.

PACIFIC-MAJOR CONSTRUCTION CO., INC., a California Corporation, DEBORAH S. GOLDS, RUTH LEWIS, BERT A NOTCH, and ROLAND ROJAS,

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of California, Denied - August 15, 1996

PETTTION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the California Legislature has the power to regulate the mode of appellate review in such a way that impairs or defeats the courts' appellate jurisdiction in a civil case involving a court ordered binding arbitration.

2. Whether §§1286.2 (c) and (d), 1286.2 as a whole, 1286.6 and 1281.2, subd.(b) of the California Code of Civil Procedure, as interpreted by the Supreme Court of California in MONCHARSH v. HEILY & BLASE (1992) 3 Cal.4th 1, regulate appellate review of all cases with factual content similar to that of the case at bar in such a way as to impair or defeat the duly constituted judiciary's jurisdiction for full appellate review.

3. Whether, because of the Supreme Court of California decision in MONCHARSH v. HEILY & BLASE, (1992) 3 Cal. 4th 1 holding that when a trial court is presented with an arbitration award that is erroneous on its face and will probably cause substantial injustice, it has no choice but to confirm the award, make it its own judgment and is precluded from reviewing the merits of the award, unless it is shown that the non-judge arbitrator has been corrupt or biased, such decision, interpreting the effect of California Code of Civil Procedure, §§ 1286.2 (c) and (d) renders the statute unconstitutional as depriving the aggrieved party litigant of both procedural due process and substantive due process.

4. Whether a state court order directing

the parties to arbitration, after they had mutually engaged in full pre-trial procedures such as a motion for summary adjudication, over the objections of the petitioner herein, under the provisions of a construction contract involving a construction company that was not viable because of non-compliance with the state's statutory requirements for viability as the contracting party with the petitioners, terminates a separate and distinct proceeding and is therefore appealable, thus rendering the said order an unconstitutional deprivation of due process where the intermediate appellate court finds that it is precluded from judicially reviewing the merits of such and order and the arbitration award that resulted.

5. Whether an arbitrator who makes a finding that a party litigating a matter before him under an order by the court finds that petitioner was guilty of malicious prosecution and abuse of process without conducting a trial as to said issues wherein the petitioners could present evidence in their defense deprives the petitioners of their constitutional rights to defend themselves and to cross-examine their accusers in violation of procedural due process of the Fifth Amendment to the United States Constitution and the deprivation of notice that there was in fact a quasi-judicial proceeding being conducted by the arbitrator whose award and findings are reflected in his award.

UNITED STATES SUPREME COURT RULE 14(b)(e[iv]) and (g[i]) STATEMENT

The following is a list of all parties to these proceedings and in the arbitration proceedings and the Courts in California where the case was initiated:

Sydney Koven, Barbara Koven, aka Barbara A. Wood, Garret Gallery, Inc., a California Corporation -- Petitioners

Pacific-Major Construction Co., Inc. a [non-viable] California Corporation, Deborah S. Golds, Ruth Lewis, Bert A. Notch and Roland Rojas -- Respondents.

Because each of the courts involved in this matter have been precluded from judicially reviewing the merits of the arbitrator's award (Appendix "A"), under the interpretation of California Code of Civil Procedure §§1286.2(b) and (c), mandated by MONCHARSH v. HEILY & BLASE, (1992), 3 Cal.4th 1, the invitation by the petitioners as plaintiffs and appellants in the state courts (California) to review the record of the entire court proceedings was declined by each of the courts, as was the record of the arbitration proceedings reflected in Appendices"A", "B", "C", "D", and "E". However, Appendix "E" does lucidly show at pages 21E, 22E, 23E and 24E that the record of the constitutional questions presented in the California Court System which had been submitted to each of said courts, did directly involve the questions of due process and equal protection of the laws and dirctly pointed to the state's unconstitutional regulation of what amounted to a compulsory arbitration system that directly interfered with and limited the judiciary's inherent powers of judicial review of civil disputes, among other things.

This Court should note that the question

of whether the arbitrator had denied trial to petitioners and had unconstitutionally found them and their attorney to have been guilty of malicious prosecution and abuse of process as elaborated upon in this petition and as shown in Appendix "A" at pages 7A and 10A, could not have arisen at the time of the interposition of Appendix "E" by the petitioners in opposition to the court's order compelling arbitration, and therefore was a part of the record and the proceedings in the arbitration hearing from which the appellate review was precluded by MONCHARSH and California Code of Civil Procedure §§1286.2.

DISCLOSURE STATEMENT PURSUANT TO RULE 29.1

PACIFIC-MAJOR CONSTRUCTION CO., INC. is a non-viable California Corporation which had filed but not received a discharge in bankruptcy concerning the debt arising out of arbitration award judgment in favor of plaintiffs below, and has been declared by said judgment to have been non-viable and not having had the capacity to either defend or prosecute any side of any issue involved in this case in either the court proceedings or the arbitration proceedings because of non-payment of state imposed franchise taxes and not seeking nor receiving any kind of certificate of revivorship, and an official suspension of charter. This company was and is privately held by other individual defendants in this case and was represented by counsel during the entire proceedings which took place in the Superior Court of the State of California, County of Ventura, prior to the said court's order compelling binding arbitration over the objections of the plaintiffs.

GARRET GALLERY, INC., a California Corporation, is privately held by the Plaintiffs, Sydney Koven and Barbara A. Koven and is currently viable and authorized to do business by said state, and was so during the entire proceedings herein pertinent.

CALIFORNIA – §1286.2(a)(b)(c)(d)(e)and(f) OF THE CODE OF CIVIL PROCEDURE -- PERTINENT PORTIONS OF SAID STATUTE INVOLVED AND CONTENDED TO BE UNCONSTTTUTIONAL IN THIS PETTTION FOR WRIT OF CERTIORARI

"1286.2. Grounds for vacation of award.

.....[T]he court shall vacate the award if the court determines any of the following:
(a) The award was procured by corruption, fraud or other undue means.
(b) There was corruption in any of the arbitrators.
(c) The rights of the party were substantially prejudiced by misconduct of a neutral arbitrator.
(d) The arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted....."

DISCLOSURE OF ISSUE OF CONSTITUTIONALITY OF A STATUTE OF THE STATE OF CALIFORNIA AS DRAWN INTO QUESTION HEREIN AND NEITHER THE STATE NOR ANY AGENCY, EMPLOYEE OR OFFICER THEREOF IS A PARTY, AS REQUIRED UNDER RULE 29.4 (c)

This will constitute notification to The ATTORNEY-GENERAL OF THE STATE OF CALIFORNIA that the constitutionality of California Code of Civil Procedure §§ 1282.6 (c) and (d) and their enabling adjuncts and interpretations by case, including but not limited to MONCHARSH v. HEILY & BLASE, (1992) 3 Cal.4th 1 is herein drawn into question. The State of California is not a party to these proceedings, and 28 U.S.C. §2403(b) may apply. This notification is hereby served with this petition on the Attorney-General of the State of California, Sacramento, California.

TABLE OF CONTENTS — Page

QUESTIONS PRESENTED..... i,ii

UNITED STATES SUPREME COURT RULE
14(b)(e[iv]) and (g[i]) (iii,
STATEMENT.....(iv

DISCLOSURE STATEMENT PURSUANT TO
RULE #29.1..... v

CALIFORNIA CODE OF CIVIL PROCEDURE
§§1286.2(a)(b)(c)(d)(e) and
(f)--PERTINENT PORTIONS OF SAID
STATUTE INVOLVED AND CONTENDED
TO BE UNCONSTITUTIONAL IN THIS
PETITIONFOR WRIT OF CERTIORARI..... v,vi

DISCLOSURE OF ISSUE OF CONSTITUTION-
ALITY OF A STATUTE OF THE STATE
OF CALIFORNIA AS DRAWN INTO QUEST-
ION HEREIN AND NEITHER THE STATE
NOR ANY AGENCY, EMPLOYEE OR OFFI-
CER THEREOF IS A PARTY, AS RE-
QUIRED UNDER RULE #29.4(c)..... vii

PETITION FOR WRIT OF CERTIORARI..... 1

ARBITRATION AWARD AND FINDINGS,
SUPERIOR COURT, CONFIRMATION
OF AWARD AND JUDGMENT THEREON,
COURT OF APPEALS, 2d DISTRICT
AND SUPREME COURT OF CALIFORNIA,
OPINIONS BELOW..... 2

JURISDICTION..... 2

PREFACING STATEMENT..... 2

STATEMENT OF THE CASE..... 8

FACTS AS OPINED BY CALIFORNIA
COURT OF APPEALS.....12

REASONS FOR GRANTING THE WRIT.....14

THE ATTITUDE OF THIS COURT AND OF
THE ENTIRE JUDICIAL REVIEW
SYSTEM SHOULD BE TO FAVOR
FULL APPELLATE REVIEW OF ALL
AWARDS WHICH ARE ADOPTED BY
THE COURTS AS FINAL JUDGMENTS
OF THE COURT SO ADOPTING SAME.....19

CORRELATING THE RESTRICTED AND
LIMITED RECORD PERUSED BY
THE JUDICIARY IN THIS CASE
WITH THE QUESTIONS SET FORTH
ON PAGES i and ii OF THIS
PETITION FOR WRIT.....21

CONCLUSION.....27

TABLE OF CONSTTITUTIONAL REFERENCES

Page

ARTICLE III, United States Const.....3

Fifth Amendment, United States Const....ii,2

Fourteenth Amendment, United States Const.....(2,16, (22,27

TABLE OF RULES AND STATUTE REFERENCES

U.S. Supreme Court Rules, #29.4(c).....vii
U.S. Supreme Court Rules, #10(b)(c).....2
Title 28 U.S.C. 1257(a).....2

California Code of Civil Procedure (i,iii,vii
§§1286.2(b)(c)(d).....(12,20,21,25
§§1286.2, 1286.6...(i,iv,v,15,16,21,25
California Code of Civil Procedure
§1281.2(b).....i
California Code of Civil Procedure
§§902, 904, 904.1(a)(1).....21,24
California Revenue & Taxation Code
§§23304, 23304.5.....10,11,25

TABLE OF CASES

Babb v. Superior Ct. (1971)
3 Cal.3d 841, 92 Cal.Rpt'r 179,....20
Baker v. Carr (1962)
369 US 186, 7 L Ed2d 663,
82 S Ct 691.....2,17
Chas, Wolff Packing Co. v. Court of
Industrial Relations (1923),
262 US 522,67 L Ed 1103,43 S Ct 630
27 ALR 1280, later app 267 US 552,
69 L Ed 785, 45 S Ct 441.....22,23
California State Auto Assoc. Inter-Ins.
Bureau v. Superior Court, (1990)
50 Cal.3d 658.....3,7
Clarendon, Ltd. v. Nu-West Industries,Inc.

(3d Cir.-1991) 936 Fed.2d 127,129..3,7,20
Graham v. Richardson (1971)
403 US 365, 29 L Ed2d 534,
91 S CT 1848.....18
Marbury v. Madison, (1803)
5 US 137, 2 L Ed 60.....2
Moncharsh v. Heily & Blase (1992)
3 Cal.4th 1.....(i,iii,iv.vii,5,6,11,
(12,13,15,16,21,25
Pimentel v. Houk (1951)
101 Cal.App.2d 884,887,
226 P.2d 739.....20
Precision Co. v. Automotive Co.(1945
324 U.S. 806, 814, 89 L Ed 1381,1386
65 S Ct 993.....21
Reynolds v. Sims (1964)
377 U.S. 533, 12 L Ed2d 506,
84 S Ct 1362.....17
Shapiro v. Thompson
394 U.S. 618, 22 L Ed2d 600,
89 S Ct 1322.....17
Shearson/Amer. Exp. Inc. v. McMahon (1987)
482 U.S. 220,225-227,
96 L Ed2d 185.....25,26
Sweatt v. Painter (1950)
339 U.S. 629, 94 L Ed 1114,
70 S Ct 848.....17

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SYDNEY KOVEN, BARBARA KOVEN, (also known as BARBARA A. WOOD), GARRET GALLERY, INC., A California Corporation,

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Respondents.

Petition for a Writ of Certiorari to The Supreme Court of the State of California Based on Appeal from Confirmation of an Arbitration Award as Judgment of the Court, Affirmed by Court of Appeal and Writ Denied by California Supreme Court.

PETITION FOR A WRIT OF CERTIORARI

The petitioners hereinabove named, hereby petition for a Writ of Certiorari to review the decision of the Court of appeal, 2d District, State of California, affirming the judgment of the Superior Court of the State of California confirming Arbitration Award, which was affirmed by the Supreme Court of the State of California by denying petitioners' request for Writ of Review on May 15, 1996.

ARBITRATION AWARD AND FINDINGS, SUPERIOR COURT CONFIRMATION OF AWARD AND JUDGMENT THEREON, COURT OF APPEALS, 2d. DISTRICT, AND SUPREME COURT OF CALIFORNIA -- OPINIONS BELOW.

The arbitration award involved herein is included as Appendix A; the Superior Court of California for the County of Ventura confirmation of said award and judgment thereon are included herein as Appendix B; the opinion of the Court of Appeals, 2d District is included herein as Appendix C; the denial of a writ of review by the Supreme Court of California is included as Appendix D. The petition for writ of review by the Supreme Court of California filed by petitioners is Appendix E. The entry of the judgment of the Superior Court in Ventura, California adopting the award (Appendix A) was entered June 20, 1995 (Appendix B). The opinion of the California Court of Appeals (Appendix C) was filed February 26, 1996; and, the denial of petitioners request for a writ of review concerning that opinion was filed on May 15, 1996 (Appendix D.)

JURISDICTION

The jurisdiction of this Court is invoked according to 28 U.S.C. §1257(a); Rules of the Supreme Court of the United States, adopted July 26, 1995 and effective October 2, 1995, Rule #10(b)(c); Marbury v. Madison, (1803) 5 US 137, 2 L Ed 60; United States Constitution, Amendments V (Due Process) and XIV (Due Process and Equal Protection); Baker v. Carr (1962) 369 US 186, 7 L Ed 2d 663, 82 S Ct 691.

PREFACING STATEMENT

Since 1803 and Marbury v. Madison, cited

above as being jurisdictional, this Honorable Court of Last Resort has zealously protected all the purblic's constitutional civil rights of full judicial resolution of civil disputes. It has consistently irradicated all legislation that abrogates or violates such civil rights. That duty is no less strong and imperative today. Any legislation that is judicially interpreted to circumscribe and abrogate the duty of the judiciary (duly elected or appointed as the case may be) to give the public full judicial review of legal proceedings which have invoked the legal jurisdiction of the duly constituted judiciary cannot be condoned or approved by this Honorable Court. The people have had no hand in the choice of private arbitrators or tribunals which seem to have arisen because of the explosion of litigation in our courts. The courts have no power to delegate the authority that the people and the constitutions of the governments involved have given them, even though the parties have contracted to shift said jurisdiction to the private sector! (See California State Auto. Assoc. Inter-Ins. Bureau v. Superior Court (1990) 50 Cal.3d 658 [Clarendon Ltd. v. Nu-West Industries, Inc. (3d Cir. 1991) 936 Fed.2d 127, 129 ("action by the court can be neither purchased nor parleyed by the parties.")]).

Less notorious but certainly as important is this Court's duty to police the judicial systemto ensure the public's right to its own constitutional function as defined in Article III of our National Constitution. This function certainly includes an unfettered, unencumbered right reserved to the public to guaranteeing a right to expect that the full right of review without artificial boundaries imposed will be exercised as to any and all final judgments that arise out of (no matter in what manner) the lower court

civil system as well as in criminal decisions of the court system!

When a lower court interprets an otherwise constitutional statute (not admitted but, for the sake of argument only) in an unconstitutional manner, it is this Court's duty to exercise its discretionary power and its protective responsibility for the sake of preventing future infliction of substantial injustice occasioned by the court system's following of the interpretation by striking that decision -- the public is entitled to this performance of constitutional obligation. The concern should not be whether of not the result affects the entire industry of arbitration for dispute resolution, private sector tribunals, and agencies which have been set up for the alleviation of court congestion. People and their numbers, not frivolous litigation as it is subjectively termed by individual judges and arbitrators, make for most of that congestion. The judiciary should not have the power to condone legislation that unconstitutionally circumscribes it judicial powers and responsibilities merely by parroting a legally wrong and incorrect decision by an arbitrator who is acting under the initial authority of a private contract, ONLY!

The historical prerogative of this Court to refuse or grant certiorari of a lower state court decision under these circumstances should be exercised in favor of such review in this civil case. The reality of business and daily living issues, such as are enumerated above are just as impactive on the public's well-being as are the criminal issues of today. In Fact the civil aspect of the law of the United States is perhaps more important than the criminal side, merely because we all indulge in business and commercial enterprise of one form or another, while only a small

percentage of the population engages in criminal activity on the side of its commission and on the side of prosecution!

Our trust in the judicial system is largely governed by this Court's final decisions. The refusal to review this very significant matter will leave the California public in a frustrating position of watching its Constitutional right to full judicial review and action of arbitration cases that exhibit a painfully substantial injustice upon one of the litigants, literally disappear-- in other words, because of a decision by the Supreme Court of California, the entire judicial system insofar as regulating arbitration by contract is concerned, is quite hamstrung! It cannot review the merits of such proceedings, except in very limited ways, involving the corruptness and biased attitudes of non-judge, retired judge, private sector arbitrators. The merits of what those persons do in hearing the matter as a "judge" are fully eviscerated from judicial appellate scrutiny, even though the award results in substantial injustice, without such review -- a dubious luxury for the private industry and a vivid impediment for the operation of a truly, public-minded judicial system. The public at large is the"fall-guy" for such far-reaching and damaging unconstitutionality!

The California Supreme Court decision denying review in the case at bar, actually leaves the public of the state with MONCHARSH V. HEILY & BLASE, 3 Cal.4th 1 (1992) as the state's leading authority for limited appellate review of an arbitration award case. In fact this counsel respectfully suggests that the facts in the case at bar are certainly more aggravated in favor of such appellate review, that those in MONCHARSH, since, **in this case, the attorney-arbitrator actually advises in his award that the defendants (respondents**

here) seek further damages that he wishes to assess in this case and has not, against the plaintiffs-petitioners here and their attorney for malicious prosecution and/or abuse of process, actions of which the arbitrator without trial or notice finds the petitioners here guilty. (Appendix A, pp. 7A, 10A and 12A).

However, this counsel feels that it is quite necessary and certainly appropos to devise a brief that will make certain that this Honorable Court be aware of the innuendos that a decision such as MONCHARSH casts upon the whole civil legal scene. We cannot afford for the judiciary to abandon its duty to render substantial justice in all cases. Without this civil right guarantee we have no civil rights, since it is the court system that constitutionally "body-guards" our civil rights! With a court system that refuses and fails to exercise its duty to review all final judgments rendered or adopted by courts of law in accord with the parameters laid down in the United States Constitution, we, the public, are afflicted with biased and discriminating results that will end up in the public cry of disgust and frustration and the loss of dependence upon our courts to do substantial justice in all cases!

The way Moncharsh is explained in the dissent written by Justice Kennard, the majority opinion in that case is appalling, and is a travesty of mental gymnastics geared to the ultimate goal of substituting the arbitration procedure (by private contract) for the true judicial procedure and the reduction of calendar delay in the court system -- nothing more -- nothing less!

Justice Kennard with Justice Mosk concurring states:

"...The majority never mentions the judiciary's paramount obligation to do justice,

and the rule it announces--which requires trial courts to endorse decisions known to be substantially unjust--is its very antithesis. By filing its discussion with reference to the expectations of the parties, the development of decisional law over the course of a century and legislative intent as evidenced in our statute, the majority implies both that these considerations support its holding and that they are more important than doing justice. ¶The majority is wrong on both counts. For the judiciary, nothing can be more important than justice. This proposition is so self-evident that no further elaboration is necessary. Moreover, ... respect for parties' freedom to contract, the development of decisional law, the relevant statute, and ascertainable legislative intent belie rather than support the majority's holding..... But they (the parties to the contract) no doubt do expect, and ought to be able to expect, that if the award on its face is so erroneous and results in substantial injustice, a court asked to confirm the award will not turn a blind eye to the consequences of its action, but will instead take the only course consistent with its fundamental mandate and will vacate the award.....The exercise of judicial power cannot be controlled or compelled by private agreement or stipulation. (See California State Auto. Ass'n. Inter-Ins. Bureau v. Superior Court (1990) 50 Cal.3d 658, 664 ... Clarendon Ltd. v. Nu-West Industries, Inc., (3d Cir. 1991) 936 Fed.2d 127,129 ["action by the court can be neither purchased nor parleyed by the parties.]...."

This prefacing statement is made by the petitioner so as to inform this Court of the unbridled status of arbitration awards that have been spawned by the "hands-off" collective attitude of the judiciary with reference to keeping those awards within judicious and legal parameters. California has chosen to place arbitration decisions in a kingly position that cannot be touched by judicial review although such decisions are to be adopted as the court's own by confirmation. Obviously the layman, such as the petitioners here, cannot expect or anticipate the risk he takes if the arbitration decision inflicts substantial injustice upon him, when he contracts for such arbitration.

The Supreme Court of California has not arranged its responsibilities of renmdering substantial justice in accord with constitutional priorities. The public policy as declared by the judiciary should not be in favor of arbitration decision sanctification over and above the right of the public to expect full judicial review of arbitration awards. No public good, except the fostering of the increased necessity for private sector judging and expense, and a new industry, arises from such an attitude.

Justice Kennard, in his dissent in Moncharsh, (with the concurrence of Justice Mosk), says it all in the above quotations.

STATEMENT OF THE CASE

The present dispute arose out of litigation in the Ventura County Superior Court of California in late 1989, continuing through June of 1995, with Court ordered binding arbitration for which the parties were compelled to pay, occurring between the filing of the complaint by these petitioners and the rendition of the arbitration award,

(Appendix "A") and its confirmation by the Superior Court, (Appendix "B").

The plaintiffs in the Superior Court action in California are the same as the petitioners here. They sued the defendants, (respondents here, and others who were dismissed voluntarily by petitioners during the arbitration), seeking damages for breach of construction contract containing an arbitration clause and a clause for attorneys' fees to the prevailing party as to disputes arising out of the contract which was attached to the complaint in said state action. They also included causes of action for fraud, alter ego use of the corporation, PACIFIC-MAJOR CONSTRUCTION CO. INC., a defendant conspiracy, intentional infliction of emotional distress and negligence. After approximately a two and one-half ($2\frac{1}{2}$) year period had elapsed, during which extensive discovery proceedings were conducted by all parties involved, and a motion for summary judgment had been denied to the moving defendants, (respondents, here) the respondents here moved in the state court for an order compelling binding arbitration under the provisions of the construction contract, which had based the plaintiff's complaint and out of which dispute of breach thereof had arisen. The petitioners here opposed the motion compelling arbitration, contending that the California Supreme Court Case of Christensen v. De Wor Development (1983) 33 Cal.3d 778 had mandated that the court find that the moving defendants (respondents, here) had waived their contractual rights to arbitratio. (Appendix "A", p. 1A; Appendix "E", pp. 15E, 16E, 17E and 18E.)

The Superior Court ignored the opposition of the plaintiffs, (petitioners, here) and ordered a binding arbitration, which was conducted before the American Arbitration

Association, Mark Treadwell an attorney purportedly specializing in home remodelling and commerial contract disputes, who ultimately wrote Appendix "A" in its entirety. However, petitioners, having opposed the arbitration because of Christensen, and their attorney refused to file the application for arbitration, and the defendants, (respondents, here) requested the arbitration before the American Arbitration Association. However, the said defendants were found by the arbitrator to actually be respondents and treated them as such in the hearing and in the award which ultimately became the judgment by confirmation of the Superior Court. (Appendix A", p. 1A).

The arbitrator found that PACIFIC-MAJOR CONSTRUCTION, INC., was a non-viable, disenfranchised corporation and was not to be permitted to defend or prosecute and affirmative defenses it might have had, either through agents or otherwise since it had notcomplied with the State of California's requirements to remain viable either during the superior court proceedings that preceeded the arbitration, or during the arbitration hearings and thereafter under Rev. and Tax. Code §§ 23304 and 23304.5. (Appendix "A", p. 3A, fn. 1, Appendix "E", p.11E, ¶5)

Nevertheless the arbitrator and, indeed the Court, accepted and included the evidence that had been submitted by this non-viable and defunct corporation, upon which public policy had impinged the non-viability stigma, in violation of that public policy, **knowing that he was doing so, and knowing of this absolute prohibition imposed by the State of California, and refused and failed to vacate said award. [Emphasis, counsel's]** (Appendix "A",p. 3A, fn1, Appendix "E", p. 11E, ¶5, Appendix "B", Appendix "C", Appendix "D").

One must certainly assume that the arbitrator intended to misconduct himself so as to steer his award to the non-viable corporation as the obligor of the "overpayment" which he found the petitioners to have made, while also finding **from evidence taken from the non-viable corporation's employees (a direct violation of California Revenue and Taxation Code sections 23304 and 23304.5, and the stated public policy of the State of California) and determining therefrom the the said corporation (PACIFIC-MAJOR CONSTRUCTION CO.,INC., was the prevailing party in the contract dispute. This is not simply prejudicial error, it is arbitrator misconduct and obvious bias, causing substantial injustice to the petitioners, as is obvious!** (See, Appendix "A", pp. 3A, fn. 1; 4A; 6A, fn 3; 9A; 12A; 13A.)

After the matter had been arbitrated in the fashion above described, the award was then returned to the Superior Court from which it had emerged, and the defendants requested that the award be confirmed and made the judgment of the Superior Court. Plaintiffs (petitioners, here) objected vehemently, but to no avail, and said judgment was entered. (See, Appendices "A" and "B").

Petitioners then appealed to the Court of Appeal, 2nd. District, of the State of California which rendered an opinion based upon the preclusion of the merits of the arbitrator's findings and award that was required by Moncharsh v. Heily & Blase, (1992), 3 Cal.4th 1. (Appendix "C")

Petitioners then petitioned the Supreme Court of the State of California for a writ of review concerning the opinion of the Court of Appeal and that petition was denied as above stated. (Appendix "D")

None of the courts involved in this matter have ever rendered any opinion concerning

the arbitrator's acceptance and consideration of evidence presented either in the superior court or in the arbitration itself by the non-viable corporate defendant, respondent and appellee, PACIFIC-MAJOR CONSTRUCTION CO., INC. although petitioners did present said issue to the Supreme Court of the State of California in their petition, along with other issues, including but not limited to question of the constitutionality of Moncharsh and CCP §§ 1286.2 (c)(d). (Appendix "E").

FACTS AS OPINED BY CALIFORNIA COURT OF APPEAL

1. Kovens (petitioners) entered a construction contract with Pacific-Major Constructyion Co., Inc. for the remodeling of their home in November of 1989.
2. The contract contained an arbitration and attorneys fee provision.
3. Pacific-Major stopped work before completion and Kovens recorded a "Notice of Cessation" of work.
4. Kovens sued Pacific-Major Construction Co., Inc. for breach of contract,fraud, conspiracy, negligence and intentional infliction of emotional distress.
5. The trial court ordered the matter to arbitration.
6. In the arbitration the arbitrator issued the written decision as in Appendix "A" hereto attached, finding among other things: (a) That the parties terminated the contract by mutual consent; (b) that the construction was 75% complete at the time of termination, but the Kovens had paid nearly the full contract price; (c) that under a "money had and received" theory [an "invention" of the arbitrator] the arbitrator ordered Pacific-Major Construction Co., Inc. ONLY, to refund to the Kovens, the balance of $18,748.65;

(d) That the Koven's claims for fraud, conspiracy, emotional distress, alter ego liability had been determined by the arbitrator [without evidence or submission of the issues] were made "maliciously to harrass and annoy the parties named without any expectation of success"; (e) That the individual respondents were the prevailing parties and were accordingly awarded the total sum of $19,447.32 in attorneys' fees and costs "without prejudice to any responding party [seeking] to recover attorney fees, costs and other damages based upon an action for malicious prosecution and/or abuse of process." (See Appendix "C", pp. 2C and 3C).

7. Respondents here moved to confirm the arbitration award, and the petitioners here countermoved with a demand that the court vacate or correct the awards, arguing that they were in fact the prevailing parties on the contract action, and that the arbitrator had exceeded his powers when he awarded fees to the individual respondents because they are not parties to the construction contract. More importantaly however, for the purposes of this petition, the Court of Appeal of California found from the limited analysis that they were permitted to make under the review limitations of Moncharsh that the Kovens had contended that the arbitrator was biased against the Kovens and in favor of the respondents because he found that the Kovens had committed malicious prosecution and abuse of process from the evidence that he had been authorized to take. (Appendix "C", pp. 2 and 3.)

8. The Court of Appeal then made the statement that raised the issues of the constitutionality of the California statutory limitations of appellate review of arbitration decisions and the case limitation thereof by Moncharsh v. Heily & Blase (1992), 3 Cal.4th 1, 33.

That statement is as follows:

> "....Like the trial court, we decline the Kovens' invitation to review the merits of the arbitrator's award. '[A]n award reached by the arbitrator pursuant to a contractual agreement to arbitrate is not subject to judicial review except on the gounds set forth in sections 1286.2 (to vacate) and 1286.6 (for correction).' (Moncharsh v. Heily & Blase (1992) 3 Cal.4th 1,33.)[This counsel has previously pointed out the salient holdings of Moncharsh].

REASONS FOR GRANTING THE WRIT

This case arises on premises that immediately excite the issues presented in pages 1, 2 of this petition. It also raises the question of whether or not State Courts have the constitutional responsibility of safeguarding their own appellate jurisdiction by guaranteeing the public's rights to that jurisdiction; and whether this Court should strike down state court decisions that erode and limit it to a point where private contract actually controls it, and not the judiciary!

This counsel, after a very long period of practise, has experienced a growing trend of the courts to approach litigation as a public activity to be subordinated to the paramount consideration of allowing the constitutional judicial jurisdiction of litigation to be turned over to the private sector in an effort to reduce and eliminate delay in the implementation of the system.

This is the Court of Last Resort to which the public must turn, in our nation, to put on the breaks to this trend. Moncharsh and its interpretation of the appellate jurisdiction limiting statutes as above set

out, has to be declared unconstitutional as not providing the public with full rights to judicial appellate review, and thus, procedural as well as substantive due process. This Court should not countenance the existence of a statement from the Supreme Court of the State of California that is as follows:

> "....We conclude that an award reached by an arbitrator pursuant to a contractual agreement to arbitrate is not subject to judicial review except on the grounds set forth in sections 1286.2 (to vacate) and 1286.6 (for correction). Further, the existence of an error of law apparent on the face of the award that causes substantial injustice does not provide grounds for judicial review...." (Moncharsh v. Heily & Blase, 3 Cal.4th 1, 33).

Even the majority of the justices in Moncharsh agree with, and yet ignore, their own statement that their holding should not be construed as being incompatible with the public's statutory rights of full judicial review.

> "....Finally, the normal rule of limited judicial review may not be avoided by a claim that a provision of the contract construed or applied by the arbitrator, is 'illegal', except in rare cases when according finality to the arbitrator's decision would be incompatible with the protection of a statutory right...."(Moncharsh v. Heily & Blase, 3 Cal.4th 1, 33.).

The human capacity to think is the very antithesis of the procedure designed to ferret out bias and discriminating intent of an arbitrator. Unless he or she literally

confesses that such a condition existed in his or her mind, a statute requiring that the parties to an agreed upon arbitration determine that it does, is an exercise in futility and is also unconstitutional because it fosters the eradication of equal protection of law between those members of the public that are parties to litigation not involving arbitration and those parties that are involved as here.

The Fourteenth Amendment to the United States Constitution in pertinent part states:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property , without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws...."

The mandate limiting the right of judicial review as stated in California Code of Civil Procedure §§1286.2 and 1286.6 cannot intelligently and fairly be construed as anything but a legislative attempt to separate the class of civil litigation involving contractual disputes into two categories, i.e., those that arise out of a contract which provides in some way for private arbitration and those that do not contain even a vestige of such a provision. Those that contain no such arbitration clause will be entitled to full judicial appellate review as to disputes arising from their contracts, and, those that

have provided for an arbitration clause will be bound by the very limited judicial review on appeal which is mandated by statutes such as those involved herein and the cases which interpret them such as Moncharsh -- clearly requiring that a state law as interpreted by Moncharsh and the opinion therein must be struck down as requiring separation of the two classes of contract -- one with an arbitration clause, and one without such a clause. (See Sweatt v. Painter (1950) 339 US 629, 94 L Ed 1114, 70 S Ct 848, which struck down a state law requiring separation of races at state law schools).

The "new equal protection" condoned by this Court treats an extension of coverage of the Constitution to classifications other than those based on race. Succinctly stated, where the standard of review is set at a stringent level of limitation, and makes a presumptive judgment of fairness and reasonableness as to the arbitrator's award and then precludes an affected person from addressing the meritsof the classificatory judgment, this Court should strike it down because of violation of the Equal Protection Clause of the United States Constitution, on application by the person aggrieved such as the petitioners here. The Court should allow and cause the states to provide for the same stringent judicial appellate review in all civil cases, whether or not the contracts involved contain arbitration clauses. The classification of two different types of contracts is an invalid one. (See Baker v. Carr (1962) 369 US 186, 7 L Ed 2d 663, 82 S Ct 691 and Reynolds v. Sims (1964) 377 US 533, 12 L Ed 2d 506, 84 S Ct 1362; Shapiro v. Thompson (1969) 394 US 618, 22 L Ed 2d 600, 89 S Ct 1322 [Court struck down a residency requirement for public assistance because it interfered with the fundamental

right to unencumbered movement from state to state. Certainly the fundamental right of all persons to the equal protection of the laws mandates even a more stringent standard of judicial review of arbitration cases, since those awards are given by persons not elected and not governmentally appointed to their positions as judges. (See Graham v. Richardson (1971) 403 US 365, 29 L ED 2d. 534, 91 S Ct 1848).

Finally, although among other impactive reasons, this Court should actually vacate the award itself because of its exhibition of arbitrary, uncontracted for imposition of risk of substantial injustice upon the petitioners in denying them the right to defend against the accusation of the arbitrator, himself, that petitioners and their attorney had been guilty of malicious prosecution and abuse of process in their conduct of the case, and should be liable for further damages to the respondents, (all based upon so-called evidence which the courts could not review in an appropriate appellate manner because of Moncharsh.) This portion of the award obviously is unconstitutional in that it has resulted in substantial injustice to the petitioners and has deprived them of due process of law in denying them the right to present witnesses and evidence in defense of such an accusation and has arbitrarily forced upon them a conviction of said causes of action without trial, as shown above. Have we so deteriorated in our administration of fundamental civil rights that we have approved the elimination of the right to a civil trial to determine whether or not we have been guilty of such claims as malicious prosecution and abuse of process? There was no trial of the issues of whether or not the petitioners had been guilty of such accusations by the arbitrator, yet by his "findings" that

the petitioners and their attorney had been guilty thereof, he had knowingly created a res judicata finding that the petitioners in a subsequent "trial" on said issues brought by the respondents would have no opportunity to defend same. Can this Court sit idly by and refuse to review this question? (See Appendix "A", pp 7A and 10A).

This case presents an opportunity for the Court to resolve these fundamental right preservation questions that Moncharsh and the subject California statutes have thrust into the field of arbitration. This counsel caveats that arbitrators are not duly constituted judges and are not trained as such. They should not have power and discretionary authority that places them in the position of being a "COURT OF LAST RESORT"!

THE ATTITUDE OF THIS COURT AND OF THE ENTIRE JUDICIAL REVIEW SYSTEM SHOULD BE TO FAVOR FULL APPELLATE REVIEW TO ALL AWARDS WHICH ARE ADOPTED BY THE COURTS AS FINAL JUDGMENTS OF THE COURT SO ADOPTING SAME

The primary given fact in this matter is that the arbitration award admits by omission and then reference to procedural matters that occurred during the arbitration hearing that resulted in the award (Appendix "A") that the original contract clause conferring the authority to decide the issues presented, did not in any way confer the authority to decide the issues of whether or not the petitioners had been guilty of malicious prosecution and abuse of process in joining certain defendants in the original action herein. (See Appendix "A", pp. 1A, 2A, 3A, 8A, 9A, 10A, 12A, 13A). Such issues were never submitted to the arbitrator. Indeed,

the issues involved in a case of malicious prosecution or in a case of abuse of process could not have been submitted to the arbitrator because it is academic under California Law that this case had to have been concluded and final before an action for either of these causes could have been brought by the defendants-respondents, either by the actual claim in arbitration or by way of cross-complaint in the original action brought by petitioners in the Superior Court of California. (See, Babb v. Superior Court (1971) 3 Cal. 3d 841, 92 Cal.Rptr. 179, 479 P.2d. 379 -- Mrs. B sued Dr. H for malpractice. Dr. H filed an answer, and also a cross-complaint against Mrs. B and her attorney. The cross-complaint sought a declaratory judgment that, in the event he prevailed in the action, the plaintiff and her attorney be adjudged to have instituted it maliciously and without probable cause. Held: mandamus granted to compel trial court to sustain demurrer without leave to amend.) (See, also, Pimentel v. Houk (1951) 101 Cal.App 2d 884, 887, 226 P.2d 739).

This jurisdictional problem was never addressed by the courts that heard the appeal in this case because they were each precluded from doing so because of the edict of Moncharsh and statutory limitations artificially imposed on the matter by CCP §§1286.2 (c) and (d). Such a restriction requires a rearranged attitude in the judiciary. We seem to be impenetrable barrier maze constructed to minimize substantial justice and crafted to shift responsibilities to the private sector in the case of contractual arbitration. Yet, our ideals of justice remain giving lip service to that espoused by the Third Circuit Court of Appeals in 1991 at 936 Fed,2d 127, 129:

"....action by the court can be neither

purchased nor parleyed by the parties"; and as the United States Supreme Court has remarked, a court should refuse to be "the abettor of iniquity." (Precision Co. v. Automotive Co. (1945) 324 U.S. 806, 814 [89 L.Ed. 1381, 1386, 65 S.Ct. 993.]). Yet, in California, parties to a contract with arbitration clauses are consistently assuming the risk of limited judicial review even though the legislature has provided for the public's rights of full review of any final court judgment. (CCP 902, 904, 904.1(1)). The appeal requires full review of the judgment or decision which **involves the merits or necessarily affects the judgment.**

Apparently it will require this Court's intervention in order to determine which of California's laws control judgments of the Superior Court, confirming or disaffirming arbitration awards, since the judgment itself is that of the judiciary -- not the arbitrator, and does carry the right of appeal by the aggrieved party without limitation, contrary to Moncharsh and CCP 1282.6 as interpreted by Moncharsh.

CORRELATING THE RESTRICTED AND LIMITED RECORD PERUSED BY THE JUDICIARY IN THIS CASE WITH THE QUESTIONS SET FORTH ON PAGES i AND ii OF THIS PETITION FOR WRIT

1. Questions #'s 1 and 2, (Paraphrased): Does the Legislature have the power to impair or defeat by legislation the appellate jurisdiction of the Judiciary? If not, then does the opinion in MONCHARSH v. HEILY & BLASE, (1992) 3 Cal.4th 1 as to the application of CaliforniaCode of Civil Procedure, §§1286.2 (c) and (d) do so in this case?

Answer: Obviously the answer to the first part of these questions is a resounding "NO"! -- Appendix "E" at pp. 23E and 24E refer

to the Chas. Wolff Packing Co. v. Court of Industrial Relations (1923) 262 US 522, 67 L Ed 1103, 43 S Ct 630, 27 ALR 1280, later app 267 US 552, 69 L Ed 785, 45 S Ct 441 as authority for the proposition that this Court will not tolerate a system of "compulsory arbitration" which compels that disputes arising out of labor contracts providing for such dispute resolution, because it is a violation of the Fourteenth Amendment to the United States Constitution. (Kansas statute) Such a system was abhorrant to the Court because the state statute providing for its implementation deprived the persons affect of liberty and property without due process of law. The statements of this Court in that regard were quite noteworthy and should be applied in this case: (1) there is no such thing as absolute freedom of contract, but restraints on this freedom could not be arbitrary or unreasonable, [this counsel comments here that it is unreasonable to eliminate judicial review of arbitration awards that result in judgments for which the judiciary is responsible and makes, -- in violation of the state's statutory delineation of appellate jurisdiction of the court to review final judicial judgments!] (2) requiring that the the particular business involved (preparation of food in the Chas. Wolff matter) be imbued with a public interest so as to permit state regulation in the first place, [this counsel comments that the California Statutes do not adhere to this edict since they are universal in application to all contractual business activity wherein an arbitration clause is part of the contract -- certainly a violation of the Supreme Court of the United States' attitudes in this regard!] (3) stated that even if a business was classified as being imbued with a public interest, this factor did not necessarily

import that the legislature representing the public might take over the administration of the management of the business. [Counsel's comment - the fact that home remodeling business is always a matter of contract, would militate toward the proposition that the theories expounded in Moncharsh giving the statutes here involved the stature of absolute mandatory compulsion to each and every mention of dispute resolution by arbitration and compelling the parties to pay for it falls directly within the ambit of this Court's decision in the Chas. Wolff matter even though there are factual differences in the two cases.

Counsel realizes that because of the age of the Chas. Wolff decisions, the social and business times have changed and that there has been a litigation explosion, necessitating that something be done about expediting the use of court time and expense. But we must consider that the litigants in any case are paying for that time and expense through taxation, and that they will also pay, individually for the time and expense of arbitration. Carrying this truism to its extrapolated ends, means that the public pays for both avenues of approach to the resolution of contractual disputes. It is not a "boon" to the public to require that each member thereof shoulder the risks of a non-judicially trained arbitrator in the private sector, making an award that fosters "substantial injustice" that is condoned by the judiciary and adopted in a judicial judgment, without having the absolute right to a judicial review of the merits of such an arbitration award! It is ludicrouse to postulate that contracting persons providing that their contractual disputes will be resolved by arbitration are also agreeing that even if the arbitrator tramples their civil rights into the ground, they have assumed that risk and have "sold"

those rights to judicial review of the award, for the price of the obligations imposed by the contract to which they are parties!

2. The answer to the third (3rd) question on page i of this petition is again a resounding "Yes"! The restriction that there are no other grounds for the judiciary to vacate an arbitration award resulting after hearing by reason of a court order compeling same, than corruption or bias or fraud of the arbitrator completely obliterates the free range of appellate, judicial review of a judgment that has embraced the award without scrutiny of the merits thereof. [Counsel's comment: - It seems to be the consensus of Judicial Opinion that all final orders and judgments of the judiciary are appealable in unrestricted fashion, as are orders that compel arbitration such as the order to which Appendix "E" is in opposition. Under California's own scheme of appealability of final orders and judgments, a full scale appeal may be taken by anyone from a superior court judgment, in order to maintain due process and substantial justice - See California Code of Civil Procedure §§901, 904 and 904.1(a)(1).]

4. In a case where a corporate party is precluded from defending or presenting defending evidence in an arbitration case, does that factor preclude the arbitrator from rendering an award based on evidence which has been presented by the corporation's representatives in defense of a dispute arising from said contract, in favor of the non-viable corporation, and against petitioners, appealable and reviewable on the merits? Is the preclusion of the appellate court from a judicial review of the merits of the arbitration award based upon said evidence a deprivation of liberty and property of the aggrieved party in the arbitration award?

The answer to the former question is

"Yes". The answer to the latter question is "Yes". As shown hereinabove, Revenue and Taxation Code of California, §§23304 and 23304.5 provide that the privileges of the corporate entity which has not complied with the requirements of maintaining its viability as legislated by the State of California are non-existent so long as the corporate entity remains in such astate of non-compliance. That is exactly what happened in the case at bar. The entire award was based upon evidence given by the individual defendants in their own behalfs as well as the corporate behalf, and such evidence as is referred to in the award and findings therein should have been excluded with the petitioners becoming the only prevailing parties. To permit the evidence presented by a non-viable corporate entity to base the judgment of a trial court is to completely ignore the statutory and case law that renders the corporate party supposedly impotent, and thus ignore public policy and constitutional protection against the deprivation of the public's civil right to depend upon judicial review to guarantee substantial justice. This Court is the Court of Last Resort to ensure that protection by proclaiming that the arbitrator usurped jurisdiction that , on the face of Appendix "A", he did not have, i.e., the jurisdiction to hear and decide from evidence that he obviously had no authority to consider. This issue was put before the California Court in Appendix "A" at page 3A, fn 1, and Appendix "C" wherein the Court of Appeal declined petitioner's invitation to review the merits of the arbitrator's award at page 3C, because of the restrictions imposed on judicial review by Moncharsh and CCP §§1286.2 and 1286.6. (See, Shearson/American Express Inc. v. McMahon (1987) 482 U.S. 220, 225-227 [96 L.Ed.2d 185,

192-194, 107 S.Ct. 2332][federal statutory claims are arbitrable under the Federal Arbitration Act unless . party opposing arbitration demonstrates "that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue"].) Obviously there are exceptional circumstances justifying judicial review of an arbitrator's decision when a party such as the petitioners claims that the arbitrator, in violation of statutorily expressed public policy assumes jurisdiction to "breathe life" into a "dead" corporation that has become dead because of non-compliance with state statutes that grant life to that corporation! It is academic that acts in excess of authority of an arbitrator are included as being unconstitutional unless upon full appellate review of the merits of the arbitrator's award it is found that the award has not resulted in substantial injustice. No such finding exists in this case -- on the contrary it is obviously just the opposite.

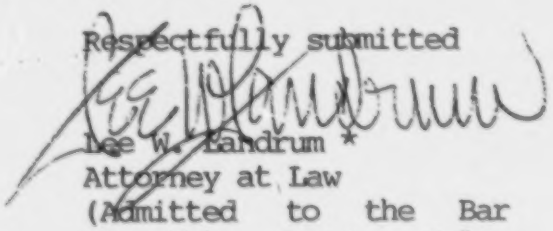
5. Issue number 5 above has been thoroughly discusswed. Suffice it to say that where the arbitrator has taken the jurisdiction to determine that one of the parties and his or her attorney have committed a completed malicious prosecution and/or abuse of process in bringing the subject action being considered in the arbitration, without notice that he is doing so and without giving the accused and "convicted" party the opportunity to defend themselves in a trial noticed for that purpose, he obviously violates the constitutional provisions of due process and equal protection of the laws. This of course taints the entire award and should be cause to vacate it and return the matter to the Superior Court for review and reversal of the award showing the petitioners to be the prevailing parties and taking judgment

against the defendants according to proof as presented under the instructions of this Court. Such conduct by the arbitrator is unconstitutional in that it deprives the aggrieved party of due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

CONCLUSION

For the foregoing reasons, and legal postulations, the PETITION FOR A WRIT OF CERTIORARI, should be granted.

Respectfully submitted



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July 30, 1996

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A P P E N D I C E S

AMERICAN ARBITRATION ASSOCIATION

April 17, 1995
In Re: 72 110 01031 94

Pacific Major Construction Company, Inc. Sydney Golds. Deborah S. Golds, Kenneth Golds, Randy Lee Prescott, Bert A. Notch and Roland Rojas

and

S[i]dney Koven, Barbara A. Koven and Garret[t] Gallery, Inc. (herein sometimes "claimants")

Award

and

Ruth Lewis

The undersigned arbitrator, having been designated inaccordance with the Arbitration Agreement entered into by the above named parties, and having been duly sworn and having duly heard theproofs and legal arguments of the parties, makes the following findings and award.

Claimants initiated Ventura Superior case 117387 seekingdamages for breach of contract, fraud & abandonment, conspiracy, intentional infliction of emotional distress and negligence. The court ordered the matter to arbitration. Arbitration was opposed by the claimants herein. Therefore, the parties requesting arbitration are actually respondents and shall be treated as such herein.

Claimants named two additional parties to the arbitration, IDC Corporation and Joseph Inqui. IDC Corporation and Joseph Inqui were voluntarily dismissed by claimants at the Preliminary Hearing held on November 11, 1994. [End of page 1]

The first day of hearing was held on January 25, 1995. Lee W. Landrum appeared for claimants. BrianP. Keighron appeared for Sydney Golds, Deborah Golds, Kenneth Golds, Bert Notch, Randy Prescott,Roland Rojas and Pacific-Major Construction Company, Inc. (herein "PM") Marqie A. Spiszman appeared for Ruth Lewis. Hearings occurred over six separate days. Evidence oral and documentary was received. The hearing was closed on March 24, 1995 following final briefing by the parties.

Claimants hired PM to remodel their home. A written contract was signed. PM commenced work and performed a substantial final briefing by the parties.

Was there a breach of contract?

An unjustified or unexcused failure to perform a contract is a breach. Claimants assert that PM was either in material breach (excusing further performance by claimants) or was guilty of anticipatory repudiation of the construction contract. The evidence does not support this claim, i.e. respondents were not in material breach when claimants terminated the contract and PM had not expressly or impliedly repudiated the contract.

PM was not in actual breach, material or otherwise, when claimants declared the contract terminated. PM had not expressly repudiated or unequivocally refused to perform the contract. PM did not impliedly repudiate the contract by putting it outside of PM's power to perform the contract. No action by PM to that point constituted a material breach and PM never repudiated the contract.

Mr. Koven noticed disturbing events which indicated to him that PM might not continue to perform the contract. The smell of an impending breach was in the air. Indeed, Mr. Koven's sence

of the situation was somewhat validated by the fact that PM declared bankruptcy several months thereafter.[2] Nonetheless, there was no actual breach at the time of claimants' action to terminate the contract.

[fn 1] Evidence showed on later hearing dates that Pacific-Major Construction Company, Inc. was not an active corporation at the time of the hearing. Franchise Taxes were unpaid and other requirements had not been fulfilled. No objection was raised, however, to Pacific-Major defending itself or pursuing affirmative relief until the arbitrator raised the issue and ruled that PM could not continue to defend itself in the action.

[fn 2] Had PM declared bankruptcy at the time that Mr. Koven recorded the Notice of Cessation, anticipatory repudiation would not have occured until the trustee had a reasonable time to elect to perform. [End of page 2].

Mr. Koven elected to terminate the contract by recording a Notice of Cessation on May 23, 1990. A Notice of Cessation is not normally used for such a purpose. However, Mr. Koven testified that he intended the Notice of Cessation to constitute a terminationof the contract and that he communicated that to PM, Sydney Golds, Deborah Golds and Ruth Lewis. Moreover, PM accepted the notice as termination of the contract as PM did not attempt to furnish further performance under the contract.

PM did not assert the right to complete the contract and apparently accepted termination of the contract. POM asserts that Mr. Koven breached the contract by the notice of termination (i.e. Mr. Koven prevented further performance by PM) notwithstanding PM's acquiescence in the termination. PM contends that PM sought to have Mr. Koven change his mind.

This effort was not equivalent to actually attempting to perform the contract (eg. by insisting that the contract remained in full force and effect, by giving Mr. Koven a written notice that PM was ready, willing andable to proceed - and stating an intent to proceed immediately if claimants would allow PM to do so, or by similar steps which communicated an intent to rely on existing legal rights.

In light of the foregoing,there was no breach by PM and no breach by Mr. Koven as the parties merely terminated the contract by mutual consent. A substantial portion of the contract remained uncompleted. The rights of the parties, therefore, are the subject ofa claim for money had and received (so far as Mr. Koven's claim of overpayment) and of quantum meruit (if PM made a claim of underpayment).

Reconciliation of Payments

The revised PM contract (with change orders) showed a total agreed sum for all construction to be performed by PM of $114,973. Claimants paid PM $104,978.20. It is disputed as to what sum was necessary to complete the construction work assigned to PM. Claimants paid approximately $40,000 to complete the project, but it is not agreed as to what items were within PM's scope of work or as to the reasonable value of the work furnished by others.

Claimants assert that the PM contract was only 35% complete at the time PM ceased to perform. The respondents as to the alter ego claim assert that the contract was 75% to 80% complete at that time. It is clear that claimants paid over 90% of the contract price and are, therefore, entitled to recover the amount that they overpaid. [End of page 3].

The evidence was not conclusive as to the reasonableness of the payments made by Mr. Koven to finish the job after the termination of PM. It is clear that Mr. Koven had little contracting experience and there is absolutely no basisto believe that Mr. Koven was able to proceed with substantially greater efficiency than PM. In light of the fact that claimants completed the contract (plus items not even included in the PM scope of work) for approximately $40,000, the contract was certainly more than 35% complete. Not addressing reasonableness as to the payments, the contract was at least 60% complete, and if the items outside of PM's scope of work are taken into account, more than 60% complete.

It is clear, therefore, that the PM was between 60% and 80% complete at the time of termination of the contract. Taking into account evidence as to scope of work and weighing the evidence presented, I find that the contract was 75% complete. Claimants overpayment to PM is:

Claimant's payments to PM	$104,978.20
$114,973 x 0.75 =	86,229.75
Refund due from PM	$ 18,748.45

Claimants are awarded $ 18,748.45 against Paacific-Major ConstructionCompany, Inc.[3] based on the legal theory of money hadand received.

Fraud and Conspiracy

Claimants seek damages for fraud and conspiracy. The record is devoid of support for those allegations.

Negligence and Intentional Infliction of Emotional Distress

Claimants damages arose as a result of the

termination of a construction contract. Claimants assert that numerous misrepresentationswere made to them and that it was foreseeable that these misrepresentations would lead to emotional distress. If emotional distress resulted, the distress occurred as the direct and proximate result of the mutually accepted termination of the contract which claimants instigated by recording the Notice of Cessation. Moreover, the evidence was very contested as to whether misrepresentations were made.

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[3] PM filed a bankruptcy proceeding . The case was closed as a no asset case. PM received no discharge. [End of page 4].

This case is not actually about negligence and emotional distress. This case is about a garden variety construction contract dispute. There are no facts which support making something else out of it.

Alter Ego Claims

Claimants seek to impose alter ego liability on a number of persons: Sydney Golds, Deborah Golds, Kenneth Golds, Bert Notch, Randy Prescott, Roland Rojas and Ruth Lewis. Of these, claimants only attempted to introduce evidence as to Sydney Golds, Deborah Golds, and Ruth Lewis and only sought a finding of liability as to Deborah Golds and Ruth Lewis.

Mr. Landrum admitted during the course of the hearing that he had no bsis to assert a claim against the other individuals. Mr. Landrumabandoned the claim against [Sydney Koven] on the first day of hearing because of the bar imposed by federal bankruptcy law. On the fifth hearing day, Mr. Landrum stated that he was abandoning the claim against Randy Prescott (a representative of PM

who [dissociated] himself from PM more than one year before claimants entered the contract with PM) and against Kenneth Golds (no evidence was introduced of Kenneth Golds having any connection to the Koven/PM contract or any significant connection to PM which would suggest the possibility of alter ego liability). On the sixth day of hearing, Mr. Landrum stated that he was abandoning the claim against Roland Rojas (a field superintendent for PM who supervised work on claimants' house) and against Bert Notch (the PM estimator for the Koven job).

The claims against Sydney Golds, Kenneth Golds, Bert Notch, Randy Prescott and Roland Rojas were pursued in bad faith and were frivolous. Claimants assertion of these claims was not based on a belief that a meritorious claim existed but was asserted, instead, maliciously to harass and annoy the parties named without any expectation of success.

The situation as to Deborah Golds and Ruth Lewis is only slightly more complex.

A standard analysis of potential alter ego liability is to examine the facts of a particular case in light of the excellent discussion of alter ego liability found in Associated Vendors, Inc. v. Oakland Meat Company 210 C.A.2d 825; 26 C.R. 806 (1963). The Associated Vendors case reviews prior cases to identify a variety of factors which are pertinent to evaluate claimed alter ego liability. It is noteworthy that not one factor considered in Associated Vendors suggests a finding of alter ego liability in this case. [End of page 5].

The undisputed evidence shows that PM was incorporated, held itself out to be a corporation and acted as a corporation in conducting its affairs. There was no evidence that PM was an instrumentality or a shell of another entity.

Only Deborah Golds had actual control over the operation of PM. There is no evidence which shows that Deborah Golds used her control to eliminate the legal separateness of the corporation from herself individually. PM was not shown to be a sham or a shell entity. No evidence shows that Deborah Golds used PM to improperly shield hereself from the claims of creditors.

The evidence as to Ruth Lewis is very meager. There is no evidence that tends to indicate that PM was an instrumentality th[r]ough which Ruth Lewis conducted business, P, was not a sham or a shell entity which was used improperly to shield Ruth Lewis from creidtors.

Claimants indicate that Ruth Lewis had some sort of licensing responsibility as to the conduct of PM's business and that claimants may have been saved from dealing with PM had Ruth Lewis discharged that responsibility. Assuming that such is the case (the evidence and legal authority cited by claimants does not establish any violation or the consequence of a violation if one did occur), the licensing issue appears to be, at most, a matter of disciplinary enforcement by the California State Contractor's License Board. No basis was shown by claimants to support a conclusion that a licensing violation would result in alter ego liability exposure to PM's creditors. Claimants complained directly to the licensing board and their licensing remedies, if any, are not found to be material here.

Claimants will, therefore, take nothing as to their alter ego claims.

Attorney Fees

Two significant issues were litigated which involve attorney fees: the rights of claimants and of PM under the written contract and the

liability of the named individuals as the alter egos of PM for contract damages. The written contract has an attorney fees clause.[4] However, claimants are awarded a recovery [End of page 6]

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[4] The contract provides, "If either party becomes involved in litigation arising out of this contract or the performance thereof, the court in such litigation, or in a separate suit shall award reasonable costs and expenses, including attorney fees, to the party entitled thereto. In awarding attorney fees, the court will not be bound by any court fee schedule; but shall, if it is in the interest of justice to do so, award the full amount of costs, expenses and attorney fees paid or incurred in good faith." [Physical end of page footnote 6].

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based on a common count. PM is the prevailing party as to the breach of contract claim. PM is not legally entitled to defend the claim, however, because PMis not an active corporation since PM could not defend, PM cannot recover legal costs for defending. No award of attorney fees is made as to PM.

Claimants did not prevail on their contract claim and, in fact claimants take nothing as to their claims of breach of contract as against any party. Sydney Golds, Deborah Golds, Kenneth Golds, Bert Notch, Randy Prescott, Roland Rojas and Ruth Lewis are the prevailing parties as to the breach of contract claims and as to their asserted alter ego liaility for damages based upon breach of contract.

It is also notable that claimants' counsel acknowledged that he sought relief against Bert Notch and Roland Rojas, at least, only to facilitate discovery and to make overcoming trial objections easier. Claimants' counsel acknowledged that he

lacked evidence against Randy Prescott and Kenneth Golds and no justifiable basis was shown for proceeding against them. Claimants grudgingly dismissed Sydney Golds on the first day of hearing in light of a threat from Sydney Golds' bankruptcy attorney to seek a contempt citation from the Federal Court.

The prosecution of the case in this manner constituted an abuse of process as to Bert Notch and Roland Rojas and pursuing the claims against Prescott and the male Golds was frivolous and without the slightest merit. As such, awarding attorney fees and costs pursuant to California Code of Civil Procedure §128.5 is clearly warranted. However, it does not appear that attorney fees were paid for by Mr. Notch, Mr. Rojas, Mr. Prescott or either of the male Golds respondents. Attorney fees were apparently paid on behalf of PM by an insurance company.[5] Inasmuch as PM is precluded from obtaining relief, there is no award of CCP§ 128.5 attorney fees and no award of attorney fees under the contract for individuals other than Deborah S. Golds.[6]

Deborah S. Golds and Ruth Lewis are entitled to recover attorney fees that they reasonable and necessarily incurred, or which were paid on their behalf by an insurer, to defend against the breach of contract claims. Before making such an award, apportionment must be addressed.[Physical end pg.7]

---

5 The attorney fees may have been paid on behalf of Deborah S. Golds by the same insurance company. If so, it is impossible to separate these fees from the fees paid as to the defense of Ms. Golds based on the current state of the records. Attorney fees for defending Ms. Golds are separately discussed below.

6 If PM was entitled to recorver, a separate

issue would arise as to apportionment of the fees. [End of page 7].

The damages claimed for breach of contract are a small part of the total damages sought in this case. Most of the damages were sought on tort theories (fraud, intentional infliction of emotional distress and negligence). Attorney fees must be apportioned between damages claimed based upon the breach of contract and other types of claimed damages.

Actual apportionment is difficult based on the fact that the parties simultaneously addressed all issues raised. Any attempt at apportioning the fees by trying to divide the time after the fact would be difficult, at best, and, perhaps, impossible. A better solution is to determine a reasonable fee for defending against the contract claims given the amount in controversy, the complexity of the issues and related considerations.

Given the amount in controversy, a reasonable attorney's fee for defending against the breach or repudiation issues and the alter ego issues related to those claims is far less than the actual attorney's fees incurred. The attorney for Ruth Lewis started out knowing that Ruth Lewis did not controlPM and that Ruth Lewis did not have a position with PM that allowed her to use PM as a sham or shell entity for her own benefit. The attorney for the individual respondents knew that only Deborah S. Golds was vulnerable to an alter ego claim. No significant discovery or extensive case preparation was necessary as to the alter ego and contract claims for any of the individual respondents as all salient information was either in the possession of Deborah S. Golds, was obtainable through public records or did not exist.

The inescapable conclusion from the foregoing is that the substantial efforts made to prepare

this case for trial was to defend against the fraud, negligence and other tort claims.

Reasonable attorney fees for defending against the contract claims are found to be in the amount of $7,500 for Mr. Keighron's firm and $5,000.00 for Ms. Spiszman.

The foregoing findings and the award made herein are based solely on the attorney fee clause in the contract and are without prejudice to any responding party (other than PM) to seek to recover attorney fees, costs and other damages based upon an action for malicious prosecution and/or abuse of process. [End of page 8].

AWARD

Sidney Koven and Barbara A. Koven are awarded $ 18,748.45 against Pacific Major Construction Company, Inc.

Sidney Koven, Barbara A.Koven and Garret[t] Gallery, Inc. are awarded nothing against Sydney Golds, Deborah S. Golds,Kenneth Golds, Randy Lee Prescott, Bert A. Notch, Roland Rojas and Ruth Lewis.

Deborah S. Golds and Roland Rojas are awarded $7,500 as reasonable attorney fees to defend the breach of contract action (without prejudice to seeking the balance of attorney fees in subsequent litigation) and costs of suit in the amout of $3,168.66 for a total award against Sidney Koven, Barbara A. Koven and Garret[t] Gallery, Inc. of $10,668.66.

Ruth Lewis is awarded $5,000 as reasonable attorney fees to defend the breach of contract action (without prejudice to seeking the balance of attorney fees in subsequent litigation) and costs of suit in the amount of $3,778.66 for a

total award against Sidney Koven, Barbara A. Koven and Garret[t] Gallery, Inc. of $8,778.66.

April 17, 1995

Mark A. Treadwell

[End of page 9].

Editor's Note: This written and explanatory award, including its suggestions that the defendant-respondents file subsequent litigation in the causes of action of malicious prosecution and abuse of process against the claimants-plaintiffs was served on claimants-plaintiffs by mail on June 22, 1995 - fully 2+ months after it was determined. Reason for delay is unknown.

APPENDIX B !B

VENTURA COUNTY
SUPERIOR AND MUNICIPAL COURTS
FILED
JUN 20, 1995
SHEILA GONZALEZ, Superior and Municipal
Courts Executive Officer and Clerk
By:_____Deputy

LAW OFFICES OF ALAN E. WISTOSKY
1000 Town Center Drive, Suite 200
Oxnard, California 93030
(805) 278-0920

State Bar No. 68051

Attorneys for Defendants, DEBORAH S. GOLDS, KENNETH GOLDS, SID GOLDS, BERT A. NOTCH, ROLAND ROJAS, AND RANDY LEE PRESCOTT

SYDNEY KOVEN, BARBARA A. KOVEN (also known as BARBARA A. WOOD), GARRET[T] GALLERY, INC., a California Corporation, Plaintiffs, v. PACIFIC-MAJOR CONSTRUCTION, INC., a California Corporation, DEBORAH S. GOLDS, KENNETH GOLDS, SYD GOLDS, RANDY LEE PRESCOTT, RUTH LEWIS, BERT A NOTCH, ROLAND ROJAS, I.D.C. CORPORATION, JOSEPH INGUI, AND e, DOES 1 through 25, inclusive, Defendants.	) No. 117387) JUDGMENT

The award and findings of arbitrator Mark A. Treadwell dated April 17, 1995 (attached hereto and incorporated herein as Exhibit A to this judgment), having been

confirmed by order of this court on June 2, 1995 [End of page 1].

IT IS ADJUDGED AND DECREED:

1. That the award and findings of the arbitrator are incorporated into this judgment in their entirety; (Here, the court has incoporated Appendix A hereto as part of its judgment!).

2. That SYDNEY KOVEN and BARBARA A. KOVEN recover the sum of $18,748.45 from PACIFIC-MAJOR CONSTRUCTION COMPANY, INC.;

3. That SYDNEY KOVEN, BARBARA A. KOVEN, AND GARRET[T] GALLERY, INC., recover nothing from SIDNEY GOLDS, DEBORAH S. GOLDS, KENNETH GOLDS, RANDY LEE PRESCOTT, BERT A. NOTCH, ROLAND ROJAS and RUTH LEWIS;

4. That DEBORAH S. GOLDS and ROLAND ROJAS recover the sum of $10,668.66 from SIDNEY KOVEN, BARBARA A. KOVEN, and GARRET[T] GALLERY, INC., representing $7,500.00 for reasonable attorney's fees to defend the breach of contract action and $3,168.88 as costs of suit, without prejudice to DEBORAH S. GOLDS and ROLAND ROJAS' right to seek the balance of attorney's fees in subsequent litigation against SIDNEY KOVEN, BARBARA KOVEN and GARRET[T] GALLERY, INC.;

5. That RUTH LEWIS recover the sum of $8,778.66 from SIDNEY KOVEN, BARBARA A. KOVEN, and GARRETT GALLERY, INC., representing $5,000.00 as reasonable attorney's fees to defend the breach of contract action and $3,778.66 as costs of suit, without prejudice litigation against SIDNEY KOVEN, BARBARA KOVEN, and GARRET[T] GALLERY, INC.

Dated: JUN 15 1995 JOE D. HADDEN
Judge of the Superior Court

APPENDIX C NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

SYDNEY KOVEN, et al.,

Plaintiffs and Appellants,

v.

PACIFIC-MAJOR CONSTRUCTION, INC., et al.,

Defendants and Respondents.

2d Civil No. B095025
(Super. Ct. No 117387)
(Ventura County)

COURT OF APPEAL, SECOND DIST.
FILED
FEB 26 1996
JOSEPH A. LANE, Clerk
Deputy Clerk

Sydney Koven, Barbara A. Koven, also known as Barbara A. Wood, and Garret Gallery, Inc. (collectively, the Kovens) appeal from a judgment confirming an arbitration award declaring respondents Deborah S. Golds, Roland Rojas and Ruth Lewis to be prevailing parties in this action and awarding respondents their attorney fees and costs. The Kovens contend that they are the prevailing parties, that respondents are not entitled to recvover attorney fees because they are not parties to the contract, and that the arbitrator was prejudiced against them. We are precluded from reviewing the merits of the arbitration award because there is no evidence that the

arbitrator was biased against the Kovens or exceeded his [End of page 1] powers. (Code Civ. Proc., § 1286.2, subds. (b), (d),)[1]

Accordingly, we affirm. [Emphasis, Counsel's]

Facts

In November, 1989, the Kovens entered into a construction contract with Pacific-Major Construction Company, Inc. (Pacific-Major) for remodeling at their home. The contract contains an arbitration agreement and an attorney fees agreement. Pacific-Major stopped work before the project was completed because Sydney Koven recorded a "Notice of Cessation." TheKovens then sued Pacific-Major and several of its individual officers and employees for breach of contract, fraud, conspiracy, negligence, and intentional and negligent infliction of emotional distress. The trial court referred the matter to arbitration.

After a six-day hearing, the arbitrator issued a written decision finding that neither party was in breach when Mr. Koven filed the notice of cessation, and that the parties terminated the contract by mutual consent. At that time, construction was 75 percent complete but the Kovens had paid nearly the full contract price. Under a "money had and received" theory, the arbitrator ordered Pacific-Major to refund to the Kovens the balance of $18,748.65.

The arbitrator found no evidence to support the Kovens' claims against the individual respondents for fraud, conspiracy, emotional distress or alter ego liability. In fact, the arbitrator determined that these claims were made [Physical end of page 2]

[fn 1 All statutory references are to this

code unless otherwise stated.] "maliciously to harass and annoy the parties named without any expectation of success." **Accordingly, he declared the individual respondents to be the prevailing parties and awarded them $19,447.32 in attorney fees and costs "without prejudice to any responding party [seeking] to recover attorney fees, costs and other damages based upon an action for malicious prosecution and/or abuse of process."** [Emphasis, Counsel's].

Respondents moved to confirm the arbitration award. The Kovens responded with a motion to vacate or correct it, arguing that they were the prevailing parties on the contract cause of action and that the arbitrator exceed his powers when he awarded fees to the individual respondents because they are not parties to the construction contract. The Kovens also argued that the arbitrator was biased in favor of the individual respondents becaause he referred to their potential claims for malicious prosecution. The trial court rejected each argument and entered judgment confirming the award.

Discussion

Like the trial court, we decline the Kovens' invitation to review the merits of the arbitrator's award. "[A]n award reached by an arbitrator pursuant to a contractual agreement to arbitrate is not subject to judicial review except on the grounds set forth in sections 1286.2 (to vacate) and 1286.6 (for correction)." [Emphasis, Counsel's] (Moncharsh v. Heily & Blase (1992) 3 Cal.4th 1, 33.) Section 1286.2 allows us to vacate an arbitrator's award if, "[t]here was corruption in any of the arbitrators[,]" or if [t]he arbitrators exceeded their powers....

(Code Civ. Proc. § 1286.2, subds. (b), (d).) Here, the Kovens' only "evidence" of corruption or bias is that the arbitrator ruled against them. This is insufficient. (See e.g. Betz v. Pankow (1993) 16 Cal.App.4th 919, 926-927 [arbitrator's race, gender or religious bias]; Luster v. Collins (1993) 15 Cal.App.4th 1338, 1345 [arbitrator's undisclosed conflict of interest].)

Their argument that the arbitrator exceeded his powers by awarding attorney fees to individuals who were not parties to the construction contract is equally unpersuasive. The Kovens alleged that the individual respondents were either the alter egos or the agents of Pacific-Major. In either capacity, the individual respondents were entitled to enforce the arbitration agreement and to collect their attorney fees and costs if they prevailed. (Dryer v. Los Angeles Rams (1985) 40 Cal.3d 406, 418; Reynolds Metals Co. v. Alperson (1979) 25 Cal.3d 124, 128-129; Hall v. Superior Court (1993) 18 Cal.App.4th 427, 436; Keller Construction Co. v. Kashani (1990) 220 Cal.App.3d 222, 227-228.)

Although we are not obligated to do so (Sinclair v. Aquarius Electronics Inc. (1974) 42 Cal.App.3d 216, 229 [116 Cal.Rptr, 654]), we briefly respond to two arguments raised by the Kovens for the first time at oral argument. First, the individual respondents were not precluded from appearing at the arbitration simply because Pacific-Major was not an active corporation at that time. It is self-evident that the individual respondents were entitled to defend themselves regardless of Pacific-Major's corporate status, because the Kovens sought to recover damages from them personally. **Without reaching the merits of the arbitration award,** we also note that Hsu v. Abara (1995) 9 Cal.4th 863, 865-866

[39 Cal.Rptr.2d 824, [End of page 4] 891 P.2d 804], did not require an award of attorneys' fees to the Kovens because the Kovens did not prevail on their contract claim. Instead, the arbitrator expressly found there was no breach of the contract and awarded the Kovens a partial refund of amounts paid in advance on a money had and received theory.

The judgment is affirmed. Costs to respondents. [Emphasis, Counsels]]

NOT TO BE PUBLISHED.

YEGAN, J.

We concur;

STONE, P. J.

GILBERT, J. [End of page 5]

Second Appellate District, Division Six, No
B095025
S052776

IN THE SUPREME COURT OF CALIFORNIA

==========

SYDNEY KOVEN Et Al., Appellants

v.

PACIFIC-MAJOR CONSTRUCTION INCORPORATED, Respondent

==========

Appellants' petition for review DENIED.

SUPREME COURT
FILED
MAY 15 1995
Robert Wandruff Clerk
==========
DEPUTY

GEORGE

Chief Justice

SUPREME COURT
FILED
APR 4-1996
ROBERT WANDRUFF CLERK

DEPUTY

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

SYDNEY KOVEN, et al.,

Plaintiffs and Appellants

vs.

PACIFIC-MAJOR CONSTRUCTION CO., INC., et al

Defendants and Appellees

Case No. B095025
(Court of Appeal)

PETTTION FOR REVIEW OF DECISION OF THE COURT OF APPEAL 2d APPELLATE DISTRICT, DIVISION 6

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Koven and Garret Gallery

TABLE OF CONTENTS

Topic
PagesPETITION FOR REVIEW.....1

PREFATORY STATEMENT.....1

ISSUES TO BE DETERMINED.....4

1. In holding in Moncharsh v. Heily & Blase 3 Cal.4th (1992) that if the face of an arbitration causes substantial injustice the award is not subject to judicial review, does the Supreme Court interpret the content of CCP 1286.2(c)(d) so that its impact upon this case is such that the Court of Appeal is precluded from determining on this appeal, from the written content of the arbitrator's award containing findings of fact, whether or not the arbitrator had substantially prejudiced the rights of the plaintiffs by his own misconduct? If so, is such an interpretation of the meaning and content of CCP §§ 1286.2(c) and (d) a violation of the United States Constitution, Art. III and the Fourteenth Amendment, thereto?.....4

2. Does Moncharsh confer upon the parties to a contract containing an arbitration clause such as is present in this case, the right and power to oust the duly constituted judiciary from the jurisdiction of review to determine whether or not an arbitrator, who is not likely to have the full attributes of an Article III (U.S. Constitution and the similar provision of the State Constitution) judge, has committed error, discernable on the face of the written award, which is in excess of the powers conferred by the said contract and/or results in substantial injustice to the party seeking judicial review thereof?.....4

3. Does Moncharsh interpret CCP §§1286.2(c)(d) as controlling and/or compelling the judiciary's strict adherrence to the terms and conditions of a private agreement which by judicial interpretation has indicated that an agreed upon arbitration hearing and the award emanating therefrom is "binding" and provides no right of judicial review of the award, even if it is substantially unjust, and thus controlling the exercise of judicial power?.....5

4. Does Moncharsh and its interpretation of CCP§§ 1286.2(c)(d) require that the reviewing court proceed on the irrefutable presumption that be- [End of page i]-cause an award comes out of an arbitration which is the result of contract compulsion, that award must be confirmed without review even if the award on its face is erroneousand results in substantial injustice?.....5

5. Does Moncharsh and its interpretation of CCP§§ 1286.2(c)(d) require that the reviewing court, faced with the arbitrator's finding as to what party is the prevailing party on an issue which by private agreement is a dispute to be determine by arbitration, such as the question presented to the arbitrator herein by reason of the contract involved, is precluded from determining from the written award's face whether or not the arbitrator has ignored the public policy mandate that a corporation which is not legally viable, such as the appellee, PACIFIC-MAJOR CONSTRUCTION CO., INC. is, by reason of that public policy, not entitled to defend or prosecute or assert affirmatively, either by evidence or argument in the arbitration proceeding, its side of the dispute, and thus has substantially prejudiced the appellants' claims that the employees and agents of that

same corporation may not rely on the provisions of the subject contract to prove that they are the prevailing parties on that issue and thus entitled to attorney's fees under the same contract?.....5

6. Does Moncharsh require the Court of Appeal in this case to be precluded from reviewing the circumstances and law involved in appellants' opposition in the trial court to the confirmation and judgment arising out of the arbitration award as set forth in Appellants' Opening Brief, as, a,b,c,d,e,f,and g?.....6 - 10

NECCESSITY OF THIS COURT'S REVIEW CONCERNING THE UNIFORMITY OF DECISION BETWEEN MONCHARSH v. HEILY & BLASE (1992) 3 Cal.4th 1 and CHRISTENSEN v. DE WOR DEVELOPMENT, (1983) 33 Cal.3d 778.....10, 11

FACTS AND PROCEDURAL BACKGROUND.....13

UNCONSTITUTIONALITY OF CCP §§ 1286.2(c)(d) IF THEY ARE INTERPRETED AS SET FORTH IN MONCHARSH V. HEILY & BLASE (1992), 3 Cal.4th 1 BECAUSE OF THE PUBLIC'S CIVIL RIGHTS TO FULL JUDICIAL REVIEW OF DISPUTES WHICH ARISE OUT OF CONTRACTS AND ARE CARRIED ON IN THE JUDICIAL FORUM BY CONSENT OF THE PARTIES, EVEN THOUGH THE CONTRACT PROVIDES FOR ARBITRATION.....16
[End of page ii]

CONCLUSION.....19

APPENDIX "A" (OPINION OF COURT OF APPEAL, 2d DIST. DIVISION 6 FILED BEBRUARY 26, 1996 **[NOTE: This document is the same as APPENDIX C herein and will not be included in this copy of this Appendix E]**.....END
REFERENCE TO APPENDIX "A".....1,2,11,14

TABLE OF CONSTITUTIONAL CITAIONS

U.S.A. Constitution, Art. III.....2,4
U.S.A. Constitution, 14th Amend.....2,4
Cal.Constitution, Art.VI, §13.....9
U.S.A. Constitution,4th Amend.....10

TABLE OF STATUTES

CCP §§ 1286.2, 1286.2(c)(d).....2,3,4, 5,6,8, 10,11,16 18.

CCP § 1296.....2

CC§§ 1717(a)(b)(1).....7

Rev. & Tax. Cd.§§23304, 23304.5.....6

TABLE OF CASES

California State Auto Ass'n. Inter-Ins.Bureau v. Superior Court (1990) 50 Cal.3d 658,664 9

Christensen v. De Wor Development (1983) 33 Cal.3d 778.....11,12,13,17

Clarendon, Ltd. v. Nu-West Industries, Inc. 936 Fed.2d 127,129.....9

Moncharsh v. Heily & Blase (1992) 3 Cal.4th 1.....2,3,4,5,6,7,10, 11,12,13,14,15,16, 17,18,19.

Pacific Gas & Electric Co. v. Superior Court (1993) 15 Cal.App.4th 576,591.....15

Super 7 Motel Assoc. v. Wang (1993) 16 Cal.App.4th 541.....10

TABLE OF COURT OF APPEAL BRIEF REFERENCES

Appellants' Opening Brief, C/A p. 17.....5
Appellants' Opening Brief, C/A p. 28....13,17
Appellants' Opening Brief, C/A pp.1-24..14

[End of page iii]

SYDNEY KOVEN, et al.,	)	
	)	
Plaintiffs and Appellants,	)	
	)	
v.	)	No. B095025
	)	
PACIFIC-MAJOR CONSTRUCTION CO., INC., et al	)	
	)	
	)	
Defendants and Respondents.	)	
	)	

PETITION FOR REVIEW

To the Honorable Chief Justice of California and the Associate Justices of the Supreme Court of California;
SYDNEY KOVEN, BARBARA KOVEN, and GARRET GALLERY, INC., plaintiffs and appellants, respectfully petition for review following the decision of the Court of Appeal, Second Appellate District, Division Six, per Justice Stone, P.J., filed on February 26. 1996.

PREFATORY STATEMENT

Attached hereto is the opinion of the Court of Appeal, Second District, Division Six, issued and filed February 26, 1996, Marked Appendix "A" for reference. [Appendix "C" here]

The Court of Appeal has definitively held that it is precluded from reviewing the merits of the arbitration award in this case. The award was written in much detail and indicated the evidence that the arbitrator had considered and included so-called findings which represented the conclusions the arbitrator had arbitrarily made and actually asserted the arbitrator's findings on causes of action for malicious prosecution and abuse of process which had never been submitted to the arbitrator by any of the parties. (See Cl/tr.

Vol III, pp. 719-727 and Appendix "A", page 1).

This "parameter of review" which the Court of Appeal had chosen to invoke was apparently mandated by this court's holdings in Moncharsh v. Heily & Blase, 3 Cal.4th 1. We, thus, have to again grapple with the pressing question of whether or not, in our zeal to provide the public with a relatively inexpensive and quick method of civil disput resolution, we have created a "legal monster" that has been given more powerful and arbitrary judicial authority by the court's interpretation of CCP §1286.2 than even our duly and constitutionally created judiciary has been given by The Constitution of the United States. (Article III and the Fourteenth Amendment of the United States Constitution).

Moncharsh states quite definitively, the postulation that persons have the absolute and unconditional right to contract away the civil rights of dispute resolution that is constitutionally protected by the Due Process and Rights of Judicial Review guaranteed by our constitutions. It is time that the Court correct this misconception of what it actually meant in conveying this impression to the courts in California. Moncharsh at 3 Cal.4th 25-26 states quite succinctly:

> "....The Legislature's intent is further revealed by an examination of other statutes. For example in providing for arbitrating disputes arising from public construction contracts, Section 1286 directs that a court shall. . . vacate the award if after review of the award it determines either that the award is not supported by substantial evidence or that it is based on an error of law. (7) By specifically providing in that provision for judicial review and correction of error [which was not a mandate for the Legislature in the first place,

since the Constitution provides for review in the appellate system as a civil right guaranteed to all] but is not in section 1286.2, we may infer that the Legislature did not intend to confer traditional judicial review in private arbitration cases...." [Comment--Obviously, it is illogical to assume that the Legislature meant to exclude the right to judicial review, merely because it mentions it in one statute and not in another. This would mean that there is no appellate review available to the public in disputes over all contracts that do not have an arbitration clause as well as those that do!]

It has always been this counsel's opinion that the unconstitutional interpretation of an otherwise constitutional statute whether by a trial, appellate or state Supreme Court or arbitrator, is in and of itself a violation of the Constitution of the United States. This petition for review is in effect a respectful entreaty to this Court to truly come to grips with the following issues of constitutional law and the actual state of the condition in which the judiciary has left the trial of a civil dispute by such decisions as Moncharsh v. Heily & Blase, 3 Cal.4th 1 (1992). [End of page 3]

ISSUES TO BE DETERMINED

1. In holding in Moncharsh v. Heily & Blase, 3 Cal.4th 1, (1992) that if the face of an arbitration award causes substantial injustice, the award is not subject to judicial review, does the Supreme Court interpret the content of CCP §1286.2(c) and (d) so that its impact upon this case is such that the Court of Appeal is precluded from determining on this appeal, from the written content of the arbitrator's award containing findings of fact, whether or not the arbitrator was

truly neutral and whether or not the arbitrator had substantially prejudiced the rights of the plaintiffs by his own misconduct? If so, is such an interpretation of the meaning and content of CCP §§1286.2(c) and (d) a violation of The United States Constitution, Article III and the Fourteenth Amendment to the United States Constitution?

2. Does Moncharsh confer upon the parties to a contract containing an arbitration clause such as is present in this case, (Cl/Trans. Vol. III, pp 657-662) the right and power to oust the duly constituted judiciary from the jurisdiction of review to determine whether or notan arbitrator, who is not likely to have the full attributes of an Article III (U.S. Constitution and the similar provision of the state constitution) has committed error, discernable on the face of the written award, which is in excess of the powers conferred by the said contract aand/or results in substantial injustice to the party seeking judicial review thereof thereby substantially prejudicing the civil rights of the party so appealing? [End of page 4].

3. Does Moncharsh interpret CCP §§1286.2(c)(d) as compelling the judiciary's strict adherrence to the terms and conditions of a private agreement which by judicial interpretation has indicated that an agreed upon arbitration hearing and the award emanating therefrom is "binding" and provides no right of judicial review of the award, even if it is substantially iunjust, and thus controlling the exercise of judicial power?

4. Does Moncharsh and its interpretation of CCP §§ 1286.2(c)and(d) require that the reviewing court proceed on the irrefutable presumption that because an award comes out of an arbitration which is the result of contract compulsion, that award must be confirmed without review even if the award

on its face is erroneous and results in substantial injustice?

5. Does Moncharsh and its interpretation of CCP §§ 1286.2(c) and (d) require that the reviewing court, faced with the arbitrator's finding as to what party is the prevailing party on an issue which by private agreement is a dispute to be determined by arbitration, such as the question presented to the arbitrator herein by reason of the contract involved, is precluded from determining fromthe written award's face whether or not the arbitrator has ignored the public policy mandate that a corporation which is not legally viable, such as the appellee, PACIFIC-MAJOR CONSTRUCTION CO., INC. herein [See Cl/Transc. Vol.III, p.653 (1st ¶) and Appellant's Opening Brief, p.17], is, by reason of that public policy not entitled to defend or prosecute or assert affirmatively, either by evidence or argument in the arbitration proceeding, its side [End of page 5] of the dispute, and thus has substantially prejudiced the appellants' claims that the employees and agents of that same corporation may not rely on the provisions of the subject contract to prove that they are the prevailing parties on that issue and thus entitled to attorney's fees under the same contract? (See Rev. & Tax. Code, §§23304.1, 23304.5).

6. Does Moncharsh require the Court of Appeal in this case to be precluded from reviewing the circumstances and law involved in appellants' opposition in the trial court to the confirmation and judgment arising out of the arbitrationaward as set forth on pages 12 through 24 of Appellants' Opening Brief, which is capsulized as follws:

aa. The trial court confirmed the award that was based upon the evidence and defense of the non-viable corporate defendant in violation of public policy.

a. The arbitration clause was in a private agreement between Appellants and the PACIFIC-MAJOR CONSTRUCTION CO., INC., A NON-VIABLE AND SUSPENDED [CO.] as found by the arbitrator at Cl/Transc. Vol.III, p.653, wherein the arbitrator found that said defendant [was] not legally entitled to defend or prosecute any claim whatsoever but, even so, the arbitrator found that said corporate defendant was the prevailing party under the terms and conditions of the said private contract even though he could not consider evidence proferred by the non-viable corporate defendant and purposely made such a finding so that he could intentionally and in a spirit of biased misconduct award attorneys' fees to the [End of page 6] said individual employees and agents of the non-viable corporation, thus indicating his bias against the appellants!

b. Arbitrator assumed the role of advocate rather than that of a judge by suggesting that the defendants in whose favor he ruled could sue the appellants and their attorney for malicious prosecution and abuse of process in order to collect further attorneys' fees over and above those which he awards to the defendants.

c. CC§§ 1717(a)(b)(1) and the cases therein cited at page 13, Appellants' Opening Brief, mandate that the court award attorney's fees under the said contract to plaintiff (appellants) as prevailing party by reason of the fact that as to the contract, and the appellants' overpayment of some $18,700 as found by the arbitrator, the appellants were the party found to be entitled to recover the greater relief (albeit, purposely meaningless by reason of the arbitrator giving said overpayment award against the non-viable and defunct corporation, knowing and finding that the corporation was defunct and non-viable

as set forth above, and therefore obviously unable to respond in any such measure of damages, and inviting appellants to sue the insurance company designated by the arbitrator on a third party beneficiary basis. [This circumstance created en toto by the transparency of the arbitrator's "sanctified" vehicle of an approved award, thanks to Moncharsh]. (See Cl/Transc. Vol. III, p.7 and page 7, fn. #5). [End of page 7].

d. The Appellants' claim that the arbitrator found that the individual defendants named along with Pacific-Major Construction Co., Inc. were not signators of the subject private agreement and were not obligors nor obligees there, seems to have been overlooked by the court, which "overlooking" is condoned and mandated by Moncharshe's interpretation of CCP §§ 1286.2(c) and (d), even though it results in substantial injustice to and a violation of appellants' constitutional rights to due process and certainly to their rights to judicial review.

e. The unveiled, legal advice by the arbitrator [to the defendants] to sue the appellants and their attorney for malicious prosecution and abuse of process in order to collect further damages -- an undeniable fact resulting in misconduct of a so-called "neutral arbitrator" and a usurpation of judicial jurisdiction, not within the risks assumed by the parties to the contract. (See Cl/transc. Vol. III, pp. 628 - 629); No one who contracts for arbitration to settle disputes can be assumed to have taken on the risk of obvious attorney advocacy from a supposed "neutral arbitrator". It is ludicrous to think otherwise! (Cl/transc. Vol. III, p.636, line 9 through p.637,line 2). It is this biased attitude of the "neutral arbitrator" that results in the substantial injustice of advising the defendants to seek

additional attorney's fees incurred by them in this action in a further action for malicious prosecution and abuse of process, which have been found to have been proved in this arbitration, but over which the arbitrator [End of page 8] admittedly has no jurisdiction! Parties who agree to resolve their disputes by arbitration cannot be assumed to have abandoned their civil right to ecpect that if the award on its face, results in a biased arbitration award with substantial injustice as this one does, a court asked to confirm award will not turn a blind eye to the consequences of its action, but will instead take the only course consistent with its fundamental mandate, guaranteed by the constitution of the United States, Article III and will vacate the award. (Cal.Const.Art. VI, § 13. [Court cannot set aside a judgment for error unless the error resulted in a miscarriage of justice. Certainly, it is obvious on the face of the award that the biased, attorney-like attitude of the so-called neutral arbitrator in this case had actually resulted in the trial of the elements of malicious prosecution and abuse of process, with the appellants as the defendants and the appellees, RUTH LEWIS, DEBORAH GOLDS and ROLAND ROJAS as the plaintiffs, without the arbitrator having been given the jurisdiction to conduct such a trial, and without the appellants having been given the opportunity to defend such charges so as to accord constitutional due process to the proceedings and the parties.]) (See also California State Auto Ass'n. Inter-Ins. Bureau v. Superior Court (1990) 50 Cal.3d 658, 664 and Clarendon, Ltd. v. Nu-West Industries, Inc. [3d Cir. 1991] 936 F.2d 127, 129 - "action by the court can be neither purchased nor parleyed by the parties"). [End of page 9]

f. The attorneys' fees awarded by the

arbitrator were granted to the individual defendants under the terms of the subject contract, even though said persons were not parties to nor were they signators of said contract in violation of the edicts contained in Super 7 Motel Assoc. v. Wang (1993) 16 CA4th 541.

g. The written admission in the award by the arbitrator that in convtravention of the appellants' rights to due process and rights to confront one's accusers and to defend said accusations, he found that appellants and counsel had abused process and had maliciously prosecuted in bad faith, the individual defendants to whom he had awarded attorney fee judgments on non-contractual and tort causes of action without notice or fair trial of the elements of said causes being proved or noticed. (Cl/transc. Vol. III, pp. 630-636; 4th Amendment, USA Constitution; Cl/Transc. Vol. III, pp. 634-636.) It should be noted that the arbitrator admitted that he had, indeed, although stated as being otherwise in the award, awarded attorney's fees to the defendants, DEBORAH GOLDS, and RUTH LEWIS, on the basis of their having to defend against the plaintiffs' complaint allegations of causes of action for damages for fraud, alter ego, and for the infliction of emotional distress -- all tort actions for which attorneys' fee damages are not statutorily provided. (CCS 1717, et seq. and CCP § 1286.2)

NECESSITY OF THIS COURT'S REVIEW CONCERNING THE UNIFORMITY OF DECISION BETWEEN MONCHARSH V. HEILY & BLASE, (1992) 3 Cal.4th [End of page 10] 1 and CHRISTENSON V. DE WOR DEVELOPMENT, (1983) 33 Cal.3d 778.

The Court of Appeal opinion, attached hereto as Appendix "A" [same as Appendix "C" in the case at bar] conforming to the opinion

of this Court in Moncharsh, fails to perform its public duty of appellate review of the record placed before the Superior Court in the proceedings had therein prior to the order compelling the trial of the case to be before an arbitrator. The Court of Appeal did, however, review the record sufficiently to glean the facts of the matter as stated on page 2 of said Appendix "A", ["C", herein]. In so doing, it is the respectful contention of the appellants herein, that The Court of Appeal has failed to render an opinion that is commensurrate with the factual matters set forth in the documented record before the Superior Court as it was when that court rejected the above items of plaintiffs' arguments (¶s 1 - 9 above) as presented in opposition to the appellee's petition to confirm the arbitration award, to which this petition for review is directed. Moncharsh has mandated that there be no such review and it is the contention of this petitioner that this interpretation of the involved statute, CCP§§1286.2(c) and (d), and of Moncharsh, if based upon a factual situation non-conforming to the factual situation in this case, and by reason thereof, is not a sufficient legal basis for the confirmation of the award in this case

In the case at bar, the plaintiffs did object to an order compelling arbitration because of the many motions, and other pretrial procedures that had encompassed the disputes that had been supposedly submitted to the arbitration procedure, with the exception of the issues of constitutional and statutorily [End of page 11]violative issues that the later arbitrator's award has on itsl face thrust at the appellate proceedings hereof, before defendant's motion to compel arbitration. This motion to compel came only after the defendant's lack of success in trying

to eliminate plaintiffs' case in the trial court and decided in the trial of defendant's motion for summary adjudication to have been sufficiently viable to present its issues in a full scale, superior court trial on the contract, and the other tort issues presented by the pleadings before the superior court. The pleadings as filed by the defendants in answer to the complaint filed by the appellants herein, did not contend that the issues should be arbitrated because of the provision in the salient contract therefor, and did not do so until after the superior court had decided the defendants' motion for summary adjudication on the very issues in tort that had been decided by the arbitrator after the court had granted the defendants' motion to compel arbitration. This was not anywhere near the factual situation presented by Moncharsh which was concerned primarily with the parties initially submitting their disputes to arbitration without any order from the court compelling same. If the findings and decision in Christensen v. De Wor Development Co.,(1983) 33 Cal.3d 778, 782-783, mean anything at all this court should not give carte-blanche sanctity to an arbitration proceeding and award that is a result of an order of the Superior Court, compelling that arbitration after the proceedings have been initiated, issues have been defined and proceedings such as summary adjudication motion have been completed in the judicial system without any reference to arbitration proceedings, [End of page 12] and to its subsequent appellate review. (See page 28 of Appellants' Opening Brief filed in the C/A.)

For this reason alone, this Honorable Court should require that the award should

be vacated and that the trial proceedings should go forward in the Superior Court where it was commenced and had proceeded to the point where discovery had been completed and where the matter was merely awaiting a trial date. It was in said court for a period of about 3-4 years prior to the order comeplling arbitration andhad progressed to the point of waiting for a trial date to be assigned. But apparently we were again faced with a strained interpretation of which came first, justice or the risks of economic elimination of court-time for trials and the reduction of crowded judicial calendare, by keeping the ability of either party to a construction contract to request that the arbitration clause thereof be in a status of compelled performance, even though one of the parties vehemently objects thereto, having proceeded tothe position that the plaintiffs were in in this case expecting their constitutional right to a court trial of the issues involved. This point is what places this case outside the parameters of the holdings in Monchash, and within the holdings of Christensen as above cited. (See Cl/Transc. Vol. III, pp 529-539; Vol.II, pp 449-459).

FACTS AND PROCEDURAL BACKGROUND

The facts upon which this appeal and petition for review occurred for the most part before the Superior Court in the proceedings before trial in said tribunal. The motion to compel binding arbitration was not made until the matter had been through several Superior Court proceedings, including a [End of page 13] defendants' motion for

summary adjudication which had been determined adversely to the moving defendants. They are more fully reiterated in the subdivision of the Appellants' Opening Brief before the Court of Appeal herein between pages 1 and 24 thereof and are incorporated herein, including but not limited to the citations to the record supplied as though fully set out here. The Court of Appeal didnot refer specifically to any portion ofthis record, merely stating that Moncharsh precluded it from doing so (Appendix, "A" pp 1-6)(Appendix "C", here). The terms of Exhibit "A" to the complaint before the Superior Court filed on August 2, 1991, constituted the document in which the parties agreed to have disputes over the terms and performances thereof decided by arbitration, and which attorneys' fees were to be awarded to the prevailing party as therein set forth. (Cl/Transc. Vol.1, pp 1-26). That contract was signed only be plaintiffs and DEBORAH GOLDS, defendant, for PACIFIC-MAJOR CONSTRUCTION CO., INC., defendant --no other party. It is obvious that judicial litigation was not avoided in this case because the matter remained in the superior court litigative process until the court finally ordered it to binding arbitration in granting defendants' motions therefore, on June 1, 1994, fully 2 years, 11 months after the filing of the complain, and after all depositions and discovery had been accomplished. (Cl/Transc. Vol. III, p. 536 and [536]).

Neither the Superior Court nor the Court of Appeal opined that either had the right of review of the record submitted by the appellants as the record on appeal -- i.e., the official record of the proceedings had in the superior court (Appendix - [End of

page 14] "A" ("C", here) p.1 and Cl/Transc. Vol. III, pp. 623-[7]47), at any time. In all fairness to Moncharsh, however, it does state at page 6 of 3 Cal.4th as follows:

> "[with] limited exceptions, an arbitrator's decision is not generally reviewable for errors of fact or law, whether or not such error appears on the face of the award and causes substantial injustice to the parties."

The meaning of this statement has been taken by the courts to mean that said rule vindicates the parties' contractual choice of an arbitral forum over a judicial one. But, in our case the choice of the arbitration forum over the judicial one was not implemented by the defendants, although there had been the subject agreement, until almost $2\frac{1}{2}$ years after it had enjoyed the forum facilities of the judiciary, and after summary adjudication [had] been denied to the moving defendants. (Cl/transc. Vol. II, pp. 258-421). Pacific Gas & Electric Co. v. Superior Court (1993) 15 Cal.App.4th 576, 591, the Third Dist. of the Court of Appeal states:

> "However, where the consent to arbitrate precedes the dispute and the error of law involves and, application of the contract that is so bizarre as to be unforseeable, there is a basis for complaint by the disadvantaged party and a warrant for judicial protection attenuates as the consent becomes less informed."

This statement is a truism, but nonetheless a fact of [End of page 15] life, regardless of how strained we become in trying to adhere to the artificially illogical extensions of Moncharsh giving the arbitration procedure power far beyond that of the judiciary.

While it is difficult and perhaps, downright foolhearty, for an attorney to use his client-duty of advocacy to attempt the convincing of the Supreme Court of the State of California that it has gone "too far" with its decision in a landmark case such as Moncharsh, it becomes necessary to point to the dissenting opinion of Justice Kennard, concurred in by Justice Mosk, which essentially points to the unconstitutional but unmistakeable interpretation of the legal effect of CCP §§ 1286.2(c) and (d) on the rights of both the public and the judiciary in determining whether or not an arbitration award such as the one at bar is substantially, on its face, and by obvious irrefutable presumption of the arbitrator's thought and intent that went into the decision that cannot be touched by the judiciary because of Moncharsh, substantially unjust and unfair.

UNCONSTITUTIONALITY OF CCP §§ 1286.2(c)(d) IF THEY ARE INTERPRETED AS SET FORTH IN MONCHARSH V. HEILY & BLASE (1992) 3 Cal.4th 1 BECAUSE OF THE PUBLIC'S CIVIL RIGHTS TO FULL JUDICIAL REVIEW OF DISPUTES WHICH ARISE OUT OF CONTRACTS AND ARE CARRIED ON IN THE JUDICIAL FORUM BY CONSENT OF THE PARTIES, EVEN THOUGH THE CONTRACT PROVIDES FOR ARBITRATION.

In this case, as above demonstrated, the defendants, although proceeding in the judicial

forum for a period of almost 3 years from the filing date of the complaint filed by the [End of page 16] appellants in the Superior Court, successfully reactivated the subject contract's provision that all disputes arising from the parties' respective performances and agreements as embodied in Exhibit "A" to said complaint (the actual agreement) should be submitted to binding arbitration, and the superior court ordered the case to binding arbitration over the vehemently presented protestations of these appellants and this court's petitioners. Aside from the definitely pronounced holding that such an order is contrary to the holdings of this Court in Christensen v. De Wor Development Company, (1983) 33 Cal.3d 778, 782-783, that the continued utilization of the trial court's facilities and judging functions as granted to the public by Article 3 of the United States Constitution, constitutes a waiver of the previously contracted for agreement that such disputes should be determined, **INITIALLY BY APPLICATION TO THE PROPER ARBITRATION FORUM,** because of Moncharsh, no review could be had in this case, although it is the contention of appellants that Moncharsh cannot apply in this case because this substantial difference in the factual situations and issues presents totally different considerations as above shown.

Specifically, this factual differentiation, is completely ignored by the Superior Court and The Court of Appeal in this case, although appellants opening brief before the Court of Appeal devoted much argument to it. (Appellants' C/A Open. Brief p 28).

The Supreme Court of the United States has held unconstitutional the state labor

statute of Kansas, because it was interpreted by the Court to establish a compulsory arbitration system, and violated the Fourteenth Amendment because of the statute's interpreted deprivation of liberty and property without due process of law. (Chas. Wolff Packing Co. v. Court of Industrial Relations (1923) 262 US 522, 67 L.Ed. 1103, 43 S. Ct. 630 27 ALR 1280, later app. 267 US 552, 69 L Ed,785, 45 S.Ct. 441). There is no room for speculation that Moncharsh has impinged upon the public an interpretation of CCP §§ 1286.2(c)(d) that mandates a compulsory arbitration system especially since our case started in the superior court and after almost 3 years of judicial proceedings was ordered to arbitration over the protestations of the appellants as above shown. If the statute means that this can happen in our case, it is crystal clear that the interpretations of the statutes by the Moncharsh Court deprives appellants of liberty and property without due process of law, giving them no chance of legitimate constitutional review of the judgment of the court arising out of the arbitrator's award.

In the Chas. Wolff Packing Co. matter, above cited, the Supreme Court of the United States reversed a state supreme court judgment in favor of the arbitration statute stating: 1) that there was no such thing as absolute freedom of contract, but restraints on this freedom could not be arbitrary or unreasonable; (2) that the state, supposedly representing its public cannot arbitrarily exercise the power of compulsory arbitration at the expense of infringing upon the liberty and property of those against whom a judicial order compelling binding arbitration is rendered on a non-consentual basis. In our case there

is ample proof in the record presented to [End of page 18] the Court of Appeal to confirm, if read and considered, regardless of the impact of Moncharsh, that the arbitration involved herein was not in any way consented to by the appellants.

As shown above, the appellants being fully aware of the contractual provision for arbitration and attorneys' fees involved in the terms and conditions of the agreement (Exhibit "A" to the complaint as above cited) and the defendants in this action also being fully aware of the contractual provision for arbitration and attorney's fees chose to litigate the issues before the Superior Court tribunal instead of the arbitration forum for a period of almost 3 years and encompassing discovery and proceedings such as motion for summary adjudication before the judicial forum. Then, after the defendants had waived their right to enforce arbitration, they chose to "shop again for another forum", i.e. binding arbitration proceedings -- and the court, obviously in an effort to alleviate the congestion in its calendar, and failing to follow the holding in Christensen (above cited) ordered the matter to binding arbitration over the written opposition of appellants, thus rendering it compulsory and violating the civil rights of appellants to due process including the rights of appellants to an unrestricted appellate review of the arbitration award included within the judgment of the superior court confirming it.

CONCLUSION

It is now incumbant upon this court to vacate the arbitration award and the superior

court judgment adopting and confirming it; to revisit Moncharsh in order to reinterpret it for the purpose of clarifying and answering the issues set forth hereinabove as "ISSUES TO BE DETERMINED" (1 through 6 aa - g); to declare that which is unconstitutional to be so.

Respectfully submitted,

/S/ Lee W. Landrum

Lee W. Landrum, Attorney for the Appellants and petitioners.

No. 96-204

Supreme Court, U.S.
FILED
SEP 6 1996
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

SYDNEY KOVEN, BARBARA KOVEN (also known as BARBARA A. WOOD), GARRET GALLERY, INC., a California corporation,

Petitioners,

vs.

PACIFIC-MAJOR CONSTRUCTION CO., INC., a California corporation, DEBORAH S. GOLDS, RUTH LEWIS, BERT A. NOTCH and ROLAND ROJAS,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of California

BRIEF IN OPPOSITION FOR RESPONDENTS DEBORAH S. GOLDS, BERT A. NOTCH AND ROLAND ROJAS

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QUESTION PRESENTED

Whether this Court should grant certiorari in a case arising out of a home remodeling contract when the alleged constitutional issues were not raised by petitioners in the state Court of Appeal nor addressed or ruled upon by the state courts below.

LIST OF INTERESTED PARTIES

The petitioners are Sydney Koven, Barbara Koven (also known as Barbara A. Wood), and Garret Gallery, a California corporation. Petitioners are represented by Lee W. Landrum.

Respondents filing this Brief in Opposition are Deborah S. Golds, Bert A. Notch, and Roland Rojas. These respondents are represented by Brian P. Keighron, Law Offices of Alan E. Wisotsky.

Respondent Ruth Lewis is represented by Marquie Spiszman.

Respondent Pacific-Major Construction Co., Inc., is a bankrupt corporation, did not file a responsive pleading in the state court, and is unrepresented by counsel.

TABLE OF CONTENTS

	Page
Question Presented	i
List of Interested Parties	ii
Table of Contents	iii
Table of Citations	iv
Introduction	1
Statement of Jurisdiction	1
Statement of the Case	1
A. Course of Proceedings and Disposition of the Case Below	1
B. Correction of Misstatements in the Petition	3
Reasons for Denying the Writ	4
I. This Court should refuse to consider petitioners' arguments or questions.	4
II. In any event, petitioners had ample opportunity to prove their case.	6
Conclusion	7

Contents

Page

TABLE OF CITATIONS

Cases Cited:

People v. Triggs, 8 Cal. 3d 884 (1973) 5

Yee v. City of Escondido, 503 U.S. 519 (1992) 4, 5

Statutes Cited:

28 U.S.C. § 1257 4

28 U.S.C. § 1257(a) 1

California Codes of Civil Procedure:

§ 1281.2 5

§ 1286.2 5

§ 1286.2(c)(d) 4, 5

§ 1286.6 5

United States Constitution Cited:

Fifth Amendment 4, 5

Rules Cited:

Supreme Court Rule 10 5

Supreme Court Rule 15.1 3

INTRODUCTION

This case arises out of an alleged breach of a home remodeling contract. The contract contained an arbitration clause. The case went to binding arbitration. Simply put, petitioners were dissatisfied with the result of the arbitration.

The arbitration award was confirmed by the Ventura County Superior Court, State of California. The petitioners filed an appeal in the Court of Appeal of the State of California. The appellate court confirmed the judgment. Petitioners filed a Petition for Review with the California Supreme Court. The writ was denied. Petitioners have now filed a meritless Petition for Writ of Certiorari with this Court. Petitioners' actions should not be condoned, and their Petition should be summarily denied by this Court.

STATEMENT OF JURISDICTION

This Court should not exercise jurisdiction over this case pursuant to 28 U.S.C. § 1257(a). The alleged constitutional questions set forth in the Petition were not raised by petitioners in the state Court of Appeal nor addressed by the state courts below and thus should not be considered by this Court.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition of the Case Below

The petitioners filed a Complaint in the Ventura County Superior Court arising out of an alleged breach of a home remodeling contract. The contract contained an arbitration clause. Respondents petitioned the court to compel arbitration based on the contractual provision. The petitioners were ordered to proceed to arbitration. Interestingly, petitioners' counsel

states that he "refused" to file an application for arbitration (Petition at 10). Such refusal would have been an apparent violation of the court order. The individual defendant respondents ultimately filed the application for the arbitration with the American Arbitration Association.

The arbitrator concluded, after a six-day arbitration, that:

1. There was no breach of the contract;

2. There was no evidence to support the fraud and conspiracy claims;

3. There was no evidence to support the negligence and intentional infliction of emotional distress claims;

4. There was no basis for or evidence in support of the alter ego claims;

5. Respondents Deborah S. Golds, Roland Rojas, and Ruth Lewis were entitled to attorney's fees and costs.

There was no responsive pleading filed on behalf of the corporation in the superior court action, nor was evidence presented at the arbitration on behalf of the corporation. The arbitrator determined that the petitioners were entitled to a "refund" of $18,748.45 from the corporation based on the legal theory of "money had and received" since the petitioners had paid more money than the construction work they had received at the time of the termination of the contract.

The respondents filed a Petition to Confirm Arbitration Award. The superior court confirmed the arbitration award and denied the petitioners' application for vacation of the award. The petitioners then filed a Notice of Appeal from the judgment,

except from that part of the judgment which was in their favor and against Pacific-Major Construction Co.

The Court of Appeal affirmed the judgment. Petitioners then filed a Petition for Review to the California Supreme Court. The Petition for Review was denied on May 15, 1996. The petitioners then filed their Petition for Writ of Certiorari in this Court.

B. Correction of Misstatements in the Petition

The Petition contains numerous misstatements. Pursuant to United States Supreme Court Rule 15.1, respondents bring the following misstatements of fact contained in the Petition to the Court's attention.

Petitioners misrepresent that Pacific-Major Construction Co., Inc., was represented by counsel during the entire proceedings which took place in the superior court prior to that court's order compelling binding arbitration (Petition at v). In fact, no responsive pleading was ever filed on behalf of the corporation in the superior court proceeding.

Petitioners misrepresent to the Court that a motion for summary judgment had been denied to the respondents (Petition at 9). In fact, respondents had filed a motion for summary adjudication as to the statute of limitations for one cause of action, not a motion for summary judgment.

The Petition misrepresents that the arbitrator and court accepted and included evidence that had been submitted by the corporation (Petition at 10). In fact, the evidence at the arbitration was presented on behalf of the individual defendants and not the corporation.

The petitioners' comments regarding the arbitrator's alleged prejudice, misconduct, and bias scattered throughout the Petition are merely *ad hominem* attacks with no basis in fact.

Petitioners misstate a quote from the California Court of Appeal decision on page 12 of the Petition. The petitioners' quote from the Court of Appeal decision is that "Pacific-Major stopped work before completion *and* Kovens recorded a 'Notice of Cessation' of work." The actual quote at page 2 of the Court of Appeal decision is that "Pacific-Major stopped work before the project was completed *because* Sydney Koven recorded a 'Notice of Cessation.' " (Emphasis added to quotes.)

REASONS FOR DENYING THE WRIT

I.

THIS COURT SHOULD REFUSE TO CONSIDER PETITIONERS' ARGUMENTS OR QUESTIONS.

In reviewing the judgments of state courts under the jurisdictional grant of 28 U.S.C. § 1257, the United States Supreme Court has, with very rare exceptions, refused to consider petitioners' claims that were not raised or addressed below. *Yee v. City of Escondido,* 503 U.S. 519, 533 (1992).

The petitioners did not raise any constitutional issues in their Opposition to Respondents' Motion to Compel Arbitration. Petitioners did not raise the issues of the constitutionality of the California Code of Civil Procedure sections regarding arbitration or a violation of procedural due process of the Fifth Amendment to the United States Constitution in their appeal. It was not until their Petition for Review in the California Supreme Court that the petitioners made any issue of the unconstitutionality of California Code of Civil Procedure

§ 1286.2(c)(d). The California Supreme Court denied review. Such a denial expresses no view as to the merits of the claim, and thus the issue was not addressed by that court. *See People v. Triggs*, 8 Cal. 3d 884, 890-891 (1973). *Yee, supra*, at 533.

Respondents will briefly review the "Questions Presented" by petitioners. As to Question No. 1, the petitioners never raised an issue in the superior court or state Court of Appeal as to the scope or limitations of appellate jurisdiction or the Legislature's power to regulate appellate review. As to Question Nos. 2 and 3, petitioners never raised the question of whether Code of Civil Procedure §§ 1281.2, 1286.2, or 1286.6 were unconstitutional in the superior court or state Court of Appeal. As to Question No. 4, the petitioners never raised the issue that the court order compelling arbitration was unconstitutional. As to Question No. 5, the petitioners did not raise an issue as to a violation of the Fifth Amendment to the United States Constitution in the Court of Appeal. In any case, none of the "constitutional questions" were addressed or ruled upon by the state courts.

The United States Supreme Court generally considers the following factors in deciding whether to grant certiorari when dealing with state court decisions: (a) where the state court of last resort has decided an important federal question in a way that conflicts with a decision of another state court of last resort or a United States Court of Appeals; or (b) a state court has decided an important question of federal law that has not been settled by this Court or has decided an important federal question in a way that conflicts with relevant decisions of the Supreme Court. *See* Rules of the Supreme Court, Rule 10. Clearly, the judgment in this case does not satisfy these standards.

In short, the petitioners did not raise any constitutional issues or questions in the state Court of Appeal, and no state court addressed such a claim. Therefore, this Court should not consider such issues or claims in this case. *Yee* at 533.

II.

IN ANY EVENT, PETITIONERS HAD AMPLE OPPORTUNITY TO PROVE THEIR CASE.

The arbitration provision of the contract states that "Any controversy or claim arising out of or related to the contract, or the breach thereof, shall be settled by arbitration . . . ." The parties thereby contractually agreed that the arbitrator would decide all controversies or disputes. The petitioners did not request the courts below to review the validity, enforceability, or construction of the arbitration provision of the contract.

The petitioners had approximately four years of litigation and a six-day arbitration to prove their case. They had ample opportunity to present evidence and subpoena witnesses and to rebut the respondents' contentions. The petitioners' claim that they were deprived of any rights to defend the action is without merit.

There is no basis for the petitioners' claim that they were denied "due process."

CONCLUSION

The Petition for Writ of Certiorari is without merit and should be denied.

Dated: September 5, 1996

Respectfully submitted,

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(3)

No. 96-204

Supreme Court, U.S.
FILED
SEP 16 1996
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

SYDNEY KOVEN, BARBARA KOVEN, Petitioners, (also known as BARBARA A. WOOD), GARRET GALLERY, INC., a California Corporation,

Petitioners,

v.

PACIFIC-MAJOR CONSTRUCTION CO., INC., a California Corporation, DEBORAH S. GOLDS, RUTH LEWIS, BERT A NOTCH, and ROLAND ROJAS,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court Court of the State of California, Denied - August 15, 1996

PETITION FOR A WRIT OF CERTIORARI REPLY TO BRIEF IN OPPOSITION

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8 pp

TABLE OF CONTENTS PAGE

ADDITIONAL QUESTION PRESENTED IN
RESPONDENTS'BRIEF IN OPPOSITION
FOR DEBORAH S. GOLDS, BERT A. NOTCH
AND ROLAND ROJAS.....i

LIST OF INVOLVED PARTIES IN THE
ARBITRATION OUT OF WHICH THE ISSUES
IN THIS CASE AROSE UNDER SUPREME
COURT RULE 12.6.....ii

CALIFORNIA STATUTES:

C.C.P. §1286(c)(d).....iii
C.C.P. §1286.2.....iii
C.C.P. §1286.6.....iii
C.C.P. §1287.4.....5

CASES:

MONCHARSH V. HEILY & BLASE, 1992
3 Cal.4th 1, 33.....iii,
1,3,5
6.

CHAS. WOLFF PACKING CO. v. COURT OF INDUST.
RELATIONS, 1923, 262 US 522, 67 L.Ed.
1103, 435 S.Ct. 441.....2

CONSTITUTION:

4th Amendment, U.S.A.....1
14th Amendment, U.S.A.....2

.._____..

ADDITIONAL QUESTION PRESENTED IN RESPONDENTS' BRIEF IN OPPOSITION FOR DEBORAH S. GOLDS, BERT A. NOTCH AND ROLAND ROJAS

Whether this Court should grant certiorari in a case arising out of a construction contract when the alleged constitutional issues were purportedly not raised by petitioners in the state Court of Appeal nor addressed or ruled upon by the state courts below.

LIST OF INVOLVED PARTIES IN THE ARBITRATION OUT OF WHICH THE ISSUES IN THIS CASE AROSE UNDER SUPREME COURT RULE 12.6.

Rule 12.6 -- "All parties to the proceeding in the court whose judgment is sought to be reviewed are deemed parties entitled to file documents in this court, unless the petitioner notified the Clerk of this Court in writing of the petitioner's belief that one or more of the parties below have no interest in the outcome of the petition.....All parties other than the petitioner are considered respondents.....Parties who file no document will not qualify for any relief from this Court."

Under this rule, the parties designated on page v of petitioners' opening brief herein constitute the proper disclosure of parties pursuant to Rule 29.1 and this Rule 12.6.

Opposing respondents are incorrect in their assertion that PACIFIC-MAJOR CONSTRUCTION CO., INC. is not a proper party to this matter before this Court.

The Court's attention is called to **Appendix "A"** attached to the opening brief herein wherein the arbitration award involved makes a finding concerning PACIFIC-MAJOR CONSTRUCTION CO.'s involvement as a party to the proceedings in both the lower trial court and the arbitration proceedings at pp. 1A, 2A, 3A, 4A, 5A, 6A[fn 2], 7A, 8A, 9A [wherein the arbitrator states "If either party (KOVEN or PACIFIC-MAJOR CONSTRUCTION CO., INC.) becomes involved in litigation arising out of this contract .... etc. thus designating PACIFIC-MAJOR as a participant

party to the proceedings, and wherein the arbitrator states: "....PM (PACIFIC-MAJOR) is the prevailing party as to the breach of contract claim".... are all more than ample proof to indicate that it was reasonable to deduce that the lower court and the arbitrator classified PM as a responsive party in the litigation .

Note: This Court is reminded that the California Court of Appeals and the Supreme Court of the State of California both assumed that PM was a party to the lower court litigation because they each unconstitutionally refused to review the merits of the evidence below because of the restrictions imposed by Moncharsh v. Heily & Blase (1992) 3 Cal.4th 1, 33 and Section 1286.2 and 1286.6 of the Section 1286.2(c)(d) of the California Code of Civil Procedure, as set out in petitioners' opening brief, and Appendices "B" and "C" attached to petitioners' opening brief herein.

STATEMENT OF JURISDICTION

The Statement of Jurisdiction is correct as stated in petitioners' opening brief. Respondents in opposition are incorrect in stating in their said brief that the petition for writ of certiorari is "meritless" because the alleged constitional questions were purportedly not raised by petitioners in the state Court of Appeal nor addressed by the State Courts below. This is absolutely not true:

a. Petitioners, in their opening brief on appeal to the Court of Appeal in California (2nd District, Division 6) at page 14, thereof after review the evidence from which a legal presumption could follow, states:..."This misconduct by the arbitrator is tantamount to violations of both the plaintiffs' and their attorney's Fourth Amendment rights (4th Amendment U.S.A. Constitution)(Clerk's Transcript, Vol. III, page 634:24-636:8);

b. Petitioners, in their opening brief on appeal to the Court of Appeal in California (2nd District, Division 6) at pages 27-28 states:...."The Constitution of the United States, with which the California Constitution is not inconsistent, states in Article III,§1: "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish...."

Petitioners were complaining of the "abdication of judicial power" of review under the court's interpretation of the impact of Moncharsh v. Heily & Blase 3 C4th 1 on this case. (Pages 27,28 and 29 of petitioners'opening brief before the Court of Appeal.) The statement that the said impact

constituted a deprivation of procedural due proscess referred to the Clerk's Transcript of the proceedings in the lower courts at Vol. III, pagges 738,739, 740, 741 and 742, all of which are available to this court if needed.

c. At page 16 of the petitioners' petition for writ of review before the Supreme Court of California the specific issue of unconsitutionality of the Moncharsh decision is placed before the Supreme Court of the State and petitioners state at pages 17 and 18 thereof:"...The Supreme Court of the United States has held unconstitutional the state labor statute of Kansas, because it was interpreted by the Court to establish a compulsory arbitration system, and violated the Fourteenth Amendment because of the statute's deprivation of liberty and property without due process of law. (Chas. Wolff Packing Co v. Court of Industrial Relations (1923) 262 US 522, 67 L.Ed. 1103, 43 S.CT. 441...."). The issue had been directly before all of the state courts involved! Appendix "E" to the present petition corroborates this statement at pages 15E through 18E.

d.It is ludicrous and frustrating to read that opposing respondents herein claim that the constitutional issues raise in this petitition wer not presented to the lower trial and appellate courts. The simple truth of the matter was that such issues were presented, but under Moncharsh both appellate courts refused to review the merits of the case. That is precisely why we have asked this Court to intervene. This is not a meritless petition — it is one which is necessary to prevent the courts in California

from abdicating their duties under the sacred United States Constitution due process provisions.

It should be noted that each of these issues were first raised in the trial court in petitioners' Motion to Vacate the award, (Appendix "A") because, among other things the "so-called neutral arbitrator now decided in "Kangaroo Court Style" without full trial on the issue that plaintiffs (petitioners, here) and their counsel are to be assessed damages for having abused the process of the court and for malicious prosecution --- an unthinkable unconstitutional usurpation of judicial jurisdiction by a person without the qualifications to even be a neutral arbitrator, as required by law...." (Clerk's Transcript, vol. III, p 632 lines 24-28)

Each of the references above referred to are available to this Court if needed. (Superior Court of the State of California, for the County of Ventura, Koven, et al, v. Pacific-Major Construction Co., Inc., et al No. 117387.

3. THE STATE COURT'S DECISIONS ARE VALID IF, AND ONLY IF, MONCHARSH V. HEILY AND BLASE, 3 Cal 4th 1, (1992) IS A CONSTITUTIONAL INTERPRETATION OF CALIFORNIA CODE OF CIVIL PROCEDURE, §§1282.2(c)(d) and 1286.6

Both the Court of Appeal and the Supreme Court of California invoked an edict of the Moncharsh case(supra) to decline review of the merits of this case even though the award obviously constitutes a violation of petitioner's due process rights and even though there has been substantial injustice by said refusal to review the merits of the decision as contained in the award as indicated in the opening brief of petitioners. The refusal to review in a case which was submitted to arbitration either by court order, or because of a contractual clause in a salient contract, even though the award is obviously substantially unjust and does not render constitutional justice to one of the litigants, is a violation of due process as guaranteed in the Constitution.
(As contended in petitioners' opening brief.)
The court's said invokation of said presumption to permit any judicially untrained arbitrator to inflict substantial injustice on a party litigantas aforesaid, and thus eliminate that party's civil right to the due process of judicial review of the judgment that is adopted by the trial court as its own is an obvious, not to be permitted violations of due process as guaranteed by the United States Constitution and should not be condoned or permitted by our Court of Last Resort. This violation of due process was made particularly egregious by the extraordinarily restricted and circumscribed unobtainable for all practical purposes proof of the arbitrator's fraud or corruption.

CONCLUSION

The disconcerting thrust of the respondents' brief in opposition to

petitioners' petition for writ of certiorari seems to refuse discussion of thepoints and authorities set forth in the opening brief of petitioners. This is understandable since the logical sense of the matter demands that the judiciary cannot allow its own abdication of judicial authority to review all matters resulting in a judgment or a judgment which has been adopted by the courts as in this arbitration matter. The very sound of statement that an arbitration award is not subject to judicial review even though it causes substantial injustice is constitutionally repugnant. It literally cannot be swallowed by lawyers and laypersons alike that the judiciary could devise mentally gymnastic language to condone such a proposition. Justice Kennard, concurring and dissenting in Moncharsh (3 Cal.4th, at page 33) could not stomach the absurdity of the majority decision and felt constrained to say something in defense of the proposition that the judiciary should perform its duty of full review, even in such a case: He states:

> The majority holds that when a trial court is presented with an arbitration award that is erroneous on its face and will cause substantial injustice, the court has no choice but to confirm it. (Maj. opn, ante, at pp. 6, 33.) Because an order confirming an arbitration award results in the entry of a judgment with the same force and effect as a judgment in a civil action(Code Civ. Proc.,§1287.4) the majority's holding requires our trial courts not only to tolerate substantial injustice, but to become its active agent.¶ I cannot join the majority opin-

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> ion. I will not agree to a decision inflicting upon this state's trial courts a duty to promote injustice by confirming arbitration awards they know to be manifestly wrong and substantially unjust. Nor can I accept the proposition necessariy implied although never directly stated in the majority opinion, that the general policy in favor of arbitration is more important that the judiciary's solemn obligation to do justice...."

Without sounding trite and without being apologetic, it is now time for this Court of Last Resort to make itself heard and rectify this abominable appointment of arbitrators to be in a position of legal unassailability, and grant this petition for writ of certiorari, declaring the subject statute unconstitutional as interpreted by the Moncharsh decision and to reverse the Moncharsh decision as being violative of the due process provisions of the Constitution thus vacating the arbitration award and the judgment based thereupon in the subject case.

Respectfully submitted,

September 11, 1996 Lee W. Landrum
Attorney for Petitioners